THE
MODERN LAW REVIEW

Volume 18 January 1955 No. 1

WAIVER OF TORT

When asked why writers continually dwelt upon the same few, or seemingly few, topics, Anatole France is reported to have explained that it was because people continually needed to be reminded about essentials. This remark seems particularly apposite to that branch of law which has been variously termed "contracts implied by law," "quasi-contract," and "unjust enrichment." For the literature on this subject is copious. However, it is not proposed in this paper to examine all the anomalies to which unanalytical methods have given rise. What the present writer desires, and intends, to criticise is that peculiar device—or doctrine—known as waiver of tort.

After the decision of the House of Lords in *United Australia, Ltd.* v. *Barclays Bank, Ltd.*,[1] Lord Wright commented upon its effects.[2] The conclusion at which his Lordship arrived was that a large part of the cases in the books had become superannuated, as dealing with obsolete views of forms of action or procedure.[3] In other words, a lot of old learning must be disregarded. Lord Wright's remarks seem to have been limited to old lore about election. Perhaps it may be respectfully submitted, therefore, that so far as waiver of tort was concerned, the full effect of recent juridical, statutory, and judicial developments has not been realised, even by so learned and acute an observer as Lord Wright. In view of his Lordship's consistent advocacy of the separate existence of a doctrine of unjust enrichment, this is surprising. Few have so readily accepted unjust enrichment as a doctrine existing in its own right, providing remedies where no other proprietary remedy would be available at common law, where the circumstances do not permit of a claim in either tort or contract. The importance of that advocacy must be stressed. For the major premise upon which the argument to be submitted below is based is that unjust enrichment is not an alternative head of liability, to be used if and when desirable in lieu of some other

[1] [1941] A.C. 1.
[2] *United Australia* v. *Barclays Bank*, 57 L.Q.R. 184.
[3] *Op. cit.*, at p. 198.

mode of action, but it is designed to deal with cases in which, at common law—or in equity—there is no other way for the plaintiff lawfully to recover what rightly belongs to him.

There is some slight authority for saying that the truth of this preliminary assertion has been judicially accepted: for in *Arab Bank, Ltd.* v. *Barclays Bank, Ltd.*,[4] the Court of Appeal discussed the plaintiff's rights in unjust enrichment as a separate head of claim, having discussed the plaintiff's claim in contract. If this assertion is accepted then very little proof is required to show that the title waiver of tort is an appendix in the body of law. At one time the retention of such a separate head of action fulfilled a function; now, after centuries of development, it is not useful, but serves only as a possible source of doctrinal infection and irritation. The same effect once produced by that method of bringing an action called " waiving the tort " could be produced by allowing the court to award such damages as would make the defendant repay the amount by which he has been enriched, without regard to such limiting doctrines as " market-value."

The phrase itself, picturesque though it may be, and however pleasing and euphonious its sound,[5] does not accurately describe what it is supposed to represent. It might be interpreted to mean that the plaintiff, by " waiving " a tort, was excusing the defendant from his wrongful act, and was voluntarily surrendering any remedy which the law provided. But " waiver of tort " is not really " waiver " at all, if that word is taken to mean the foregoing of one's right of action. For the plaintiff does not forgive and forget the wrong done to him. For the expression really means that the plaintiff gives up his right to sue in *tort* and instead elects to pursue a different remedy.[6] In the old law that remedy was the action of *indebitatus assumpsit* for money had and received; in modern law it is a claim against the defendant for the amount by which he has unjustly enriched himself at the plaintiff's expense. This development of the meaning of the expression can best be demonstrated by an historical sketch.

It is well known that instances of recovery under the count of " money had and received " were confused with cases of contract by the importation into this branch of the law of fictitiously implied contracts for the equally fictitious breach, or non-performance, of which the plaintiff was given a remedy. The true juristic *basis* of waiver of tort (obscured by old cases) was the unjustified enrichment of the defendant at the plaintiff's expense. This was equally the juristic basis of other instances of quasi-contract. But the linguistic *machinery* invented by the courts for use in cases of waiver of tort differed slightly from that used in other quasi-contracts. In

[4] [1953] 1 Q.B. 527 (affd. [1954] A.C. 495).
[5] *Cf.* Lord Romer in *United Australia* v. *Barclays Bank* [1941] A.C. 1 at p. 34.
[6] American *Restatement on Restitution*, p. 525: " . . . the choice of one of two alternative remedies."

them a contract was implied easily and straightforwardly, without the need for any further exercise of judicial imagination. In waiver of tort, on the other hand, a contract could be implied only after an imaginary affirmation of the defendant's acts by the plaintiff, with the result that the former could be treated as having acted by and with the latter's authority. A constructive authority was necessary before a contract could be implied.

The practical effect and limitations of this device can be seen in the old cases. In them the plaintiff was first treated as having affirmed the tortfeasor's act. The result of such constructive affirmation was that the courts could then carry a step further their process of creating an imaginary relationship between the parties. A contractual relationship could be implied between plaintiff and defendant in which the latter was treated as the former's agent, holding on his principal's behalf the proceeds of the tortious act, and liable to account for such proceeds to the plaintiff.[7] Since such procedure could be employed, and such a relationship imagined, only where there was some pecuniary benefit to account for to the plaintiff, waiver of tort could not apply to torts which only sounded in unliquidated, indeterminate damages, such as defamation, nuisance, or negligence. It was therefore confined in the main to instances of conversion, or to trespasses to goods, resulting in the acquisition by the defendant of some financial and measurable advantage, and to analogous cases, such as the usurpation of the profits of an office.[8] In all these the defendant had benefited at the plaintiff's expense. The language of Holt C.J. would suggest that this practice of bringing *indebitatus assumpsit* instead of the proper writ in trover, trespass, or case, was an innovation, which only gradually established itself.[9] Once admitted, however, this practice enlarged its scope, until the use of *indebitatus assumpsit* was permitted in actions based on the tort which would now be called inducing a breach of contract. In *Lightly* v. *Clouston* [10] and *Foster* v. *Stewart*,[11] the plaintiff was a master whose servant had been seduced away by the acts of the defendant, for whom the servant then worked. The plaintiff was held to be entitled to claim the servant's wages from the defendant, by means of the fiction that whatever the servant earned from the new master accrued for the benefit of the old master, since the latter was entitled to the use of the servant's labour, and therefore to the money equivalent of that labour.

The transparency of this fiction was either unrealised or, more

[7] See, *e.g.*, *Arris* v. *Stukely* (1677) 2 Mod. 260 at p. 262; *King* v. *Leith* (1787) 2 T.R. 144 at p. 145; *Marsh* v. *Keating* (1834) 1 Bing.N.C. 198 at p. 215.

[8] *Howard* v. *Wood* (1679) 2 Lev. 245; *Arris* v. *Stukely* (*supra*): *cf. Lamine* v. *Dorrell* (1706) 2 Ld.Raym. 1216—wrongful administration of an estate.

[9] "These actions have crept in by degrees": *per* Holt C.J. in *Lamine* v. *Dorrell* (*supra*) at p. 1217.

[10] (1808) 1 Taunt. 112.

[11] (1814) 3 M. & S. 191.

probably, deliberately ignored.[12] The language used seems to suggest that what the plaintiff had done was to " adopt " the tort, treating the tortfeasor as an agent, and turning a relationship based on tort into one based on contract. If this had been so, then there would have been true waiver in such cases, for the plaintiff would have ratified unauthorised acts, and, by the retroaction of such ratification, the tort would be deemed never to have been committed.[13] Such an instance of true waiver occurred in *Verschures Creameries, Ltd.* v. *Hull & Netherlands S.S. Co.*[14] There the plaintiffs countermanded their instructions to the defendants, their forwarding agents, to deliver goods to a customer. Wrongly, and against these orders, the defendants delivered the goods. The plaintiffs invoiced the goods to the customer and sued him for their value. Having obtained judgment, but without satisfaction, they took bankruptcy proceedings against him. These also failed to provide the value of the goods, so they sued the defendants for negligence and breach of duty. Undoubtedly these tortious acts had occurred; but the plaintiffs had affirmed their agents' actions by their own[15]; they had waived the *tort*, not merely one particular remedy for the wrong itself. Hence they could not succeed against the defendants.

In cases of " waiver of tort," however, the truth was, and still is, that the plaintiff relied upon the tortious act in order to substantiate his claim, but sued for the proceeds of the tort as money had and received to his use.[16] The tort (or wrong—a better word since it has no overtones hinting at formal, or pleading, differences) is not " waived "; it is an essential part of the plaintiff's case. Without it he cannot succeed, for, now that the time for fictions and procedural devices has passed, without it he can show no right to the benefit he is claiming. This is clearly revealed by contrasting the *Verschures Creameries* case, in which the tort *was* waived and no remedy was available, with the *United Australia* case, in which the tort (*i.e.*, the wrong) was not waived and provided the factual basis for a claim in conversion. The pretence that the tort had never been committed and that the defendant acted throughout by and with the plaintiff's authority was simply a procedural device, to enable the more advantageous action to be brought. This device, however, as argued above, concealed the true nature of the claim, which was founded squarely upon wrongdoing by the defendant. To cling to this outworn nomenclature, therefore, is to maintain an eighteenth-century point of view which the speeches in the *United Australia* case have shown to be outmoded and unnecessary.

[12] *Cf.* Lord Atkin in *United Australia* v. *Barclays Bank* [1941] A.C. 1 at p. 28.
[13] Lord Atkin, *ibid.*
[14] [1921] 2 K.B. 608.
[15] *Cf.* Lord Atkin in [1941] A.C. 1 at p. 31: "It was the plainest case of ratification of an act."
[16] See *United Australia* v. *Barclays Bank* [1941] A.C. 1 at p. 4, *per* Denning K.C., *arguendo*; p. 18 *per* Lord Simon L.C.; pp. 34–5 *per* Lord Romer. *Cf.* American *Restatement on Restitution*, p. 525.

There were many reasons why actions for money had and received were preferred to straightforward actions in tort. Both the plaintiff and the defendant gained procedural and other advantages from the casting of a claim in such a form. The declaration in *indebitatus assumpsit*, and the answer to it, could be pleaded in general terms. The cause of action did not lapse with the death of the defendant; his executor or administrator was liable to the extent to which the estate of the deceased had been enriched. The period of limitation in actions for money had and received was longer than in tort. As far as the defendant was concerned there were two major advantages. First, he could only be condemned to pay the plaintiff the sum which the goods had produced, whereas in tort the measure of damages was the full value of the goods at the time they were converted.[17] Secondly, he could plead a set off, or deduction, by way of defence to an action for money had and received; such defences were not permitted in actions in tort.[18]

But all the differences in procedure and pleading have been swept away by the operation of a number of statutes. The position is totally altered. What could be done by a count for money had and received very often can now be done by a claim in tort, and can certainly be done by a claim in unjust enrichment.[19] The justification for the existence of a doctrine of waiver of tort has disappeared; legal reform has cut away the ground from under its feet.

Moreover, there are two other arguments which, it is suggested, reinforce the conclusion that waiver of tort has outlived its usefulness.

In the first place, to maintain its existence in the law will in all probability lead to acutely difficult problems on the question of election. The House of Lords in the *United Australia* case cleared up some doubtful points, but, it is submitted, left others still open to debate.[20]

The problems that can arise are illustrated by the judgment of Mayo J. of the South Australian Supreme Court, in *Militz and Another* v. *Bowering-Wood and Another* (Tuesday, April 13, 1954, not reported at the time of writing). A claim was made by specially endorsed writ against K. for money received *as agent for and on behalf of* B.-W., to the use of the plaintiffs.

17 *King* v. *Leith* (1787) T.R. 141 at p. 145, *per* Grose J.; *Foster* v. *Stewart* (1814) 3 M. & S. 191 at p. 202, *per* Bayley J.

18 *Lightly* v. *Clouston* (1808) 1 Taunt. 112 at pp. 114–5.

19 The question of damages is not yet settled by any authority, but on principle the limitations previously imposed (see n. 17, *supra*), would seem to be inappropriate now: for if the claim is based on an unjust enrichment the court ought to be entitled to award the plaintiff the value of which he has been deprived, which would include profit made by the defendant—as one example of direct consequential loss to the plaintiff.

20 See, *e.g.*, Lord Porter [1941] A.C. 1 at p. 54, leaving open the question of the effect on the plaintiffs' success of knowledge of their right against the defendants.

B.-W. was also sued in the same writ. B.-W. entered an appearance but K. did not, letting the judgment be entered against him by default. The amount claimed in that judgment remained unsatisfied by K., so the plaintiffs sought leave to enter judgment against B.-W. under South Australian procedure similar to that of Order 14 of the Rules of the Supreme Court. Leave was given to B.-W. to defend. When the action against B.-W. came on for hearing counsel for the plaintiffs sought leave to amend his pleading to include an allegation that K. as servant or agent of B.-W. made certain false and fraudulent representations to the plaintiffs as a result of which the money now sought to be reclaimed was handed over. The claim in contract could not succeed because of the plaintiff's original election to sue K. to judgment.[21] That being so the issue arose whether the " technical rule " was to be applied to a claim in quasi-contract (*i.e.*, unjust enrichment). Counsel for the plaintiffs argued that since the facts of the case had a tortious flavour (deceit) he could rely on the doctrine of waiver of tort and sue anyone who might be liable for tort or for unjust enrichment. Mayo J. rejected this argument for two reasons. First, because the facts relied upon to support the claim in tort could not be found in the pleadings. Secondly, because there appeared to be no case " where the action for money had and received has been held to be ' infected ' with qualities belonging to the alternative remedy in tort." With all respect to the learned judge, however, this judgment is open to criticism. First, he did not refer to any facts which could determine whether the original claim was contractual or quasi-contractual. Secondly, he did not determine whether, if the claims were quasi-contractual, which of the two rules about election, the contractual or the tort, was properly applicable. Thirdly (and from the standpoint of this essay this is most important), he did not consider whether unjust enrichment was a separate form of liability with its own rules in respect of alternative claims.

Cases like this would cause no anxiety if it were recognised that the plaintiff's right is to recover property, or its proceeds (including profit made from it), from one who has them and has unjustly enriched himself at the plaintiff's expense; and it does not matter how the plaintiff lawfully goes about the task of recouping himself, as long as he does not recover his losses twice over. The cost of retaining the doctrine of " waiver of tort " in modern law may well prove to be extensive and costly litigation in order to clarify doubtful points of law. No mature legal system should permit of the continuation of such possibilities if no purpose is thereby served.

[21] Lord Cairns in *Kendall* v. *Hamilton* (1879) 4 App.Cas. 504 at p. 514; *Morel Bros. & Co.* v. *Earl of Westmorland* [1903] 1 K.B. 64; [1904] A.C. 11; *Moore* v. *Flanagan* [1920] 1 K.B. 919. Contrast the rule in tort under the Law Reform (Married Women and Tortfeasors) Act, 1935 (Wrongs Act (S.A.), 1936–1951).

Secondly, the effects of the Judicature Acts have been sadly neglected, and even misrepresented, by many modern lawyers. If these effects are fully appreciated, it will be seen that a person's right to recover from another to the extent to which that other has benefited at the former's expense is a completely formless right, bearing no relation at all to the system of pleading and practice in operation before the Common Law Procedure Act, 1852. The Judicature Acts enforce the administration of law and equity as a single system. Whether or not this should be referred to as the " fusion " of law and equity [22] is immaterial: the practical result is that the claim in unjust enrichment in modern law is neither common law (*i.e.*, for money had and received), nor equitable. It is in effect the product of the two jurisdictions; it is *sui generis*. Whether the defendant has committed a tort or not is not relevant to such a claim; the only question is whether the defendant has been enriched or benefited at the plaintiff's expense. Hence questions of election and " waiver " do not arise. In *John* v. *Dodwell & Co.*[23] the Judicial Committee of the Privy Council were concerned with an appeal from Ceylon, where law and equity had always been administered as a single system. Consequently it was unnecessary to go into the doctrine of waiver of tort in a claim for the recovery of a cheque, or its value, from the defendants, who had innocently received it from the plaintiff's fraudulent manager.

It is submitted that this is the position in English law after the Judicature Acts. The plaintiff's loss can be recovered by a claim in unjust enrichment which does not depend upon any notions of tort or breach of contract, but upon the benefit resulting to the defendant at the plaintiff's expense. Waiver of tort, therefore, as a device and a doctrine is otiose and ripe for abolition.

G. H. L. FRIDMAN.*

[22] See *per* Denning L.J. in *Reading* v. *R.* [1948] 2 K.B. 268 at p. 275; *Nelson* v. *Larholt* [1948] 1 K.B. 339 at p. 343; " The Recovery of Money," 65 L.Q.R. 37 at pp. 48–9.

[23] [1918] A.C. 563.

* M.A., B.C.L., Lecturer in Law in the University of Adelaide.

THE DISSOLVED FOREIGN CORPORATION

A. The Recognition of a Dissolution

Questions of the recognition to be accorded to a withdrawal of corporate personality by a foreign legal system first became prominent after the Soviets had decreed the nationalisation of Russian corporations dealing with banking, insurance, shipping, and the "key industries." The decrees came before the Court of Appeal in 1923 [1] when they were construed as effecting the dissolution of the corporations in question,[2] but the House of Lords was unable to reach the same conclusion and reversed the decisions upon their facts.[3] Although a decision on fact has no binding authority the courts relied in subsequent cases [4] on this negative interpretation of the decrees, and it was not until *Lazard Bros.* v. *Midland Bank* [5] that their effect was seriously reconsidered. The House of Lords now aided by more precise expert evidence distinguished its earlier decisions on their facts, and held that a bank incorporated under the law of Imperial Russia had been dissolved by the Soviet legislation. Lord Wright, delivering the judgment of the House, then declared that a dissolution under the law of the country of incorporation [6] must be recognised in England :

> "English courts have long since recognised as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. . . . But as the creation depends on the act of the foreign State which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognise the one, as the other fact." [7]

[1] In *Ratner* v. *London Joint City and Midland Bank* (1922) 38 T.L.R. 253 it seems to have been assumed that the decrees had dissolved a Russian bank.

[2] *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1923] 2 K.B. 630; *Banque Internationale de Commerce de Petrograd* v. *Goukassow* [1923] 2 K.B. 682.

[3] *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1925] A.C. 112; *Banque Internationale de Commerce de Petrograd* v. *Goukassow* [1925] A.C. 150.

[4] *Cf.* Wortley, "The Dissolution of Foreign Corporations in Private International Law," 14 B.Y.I.L. 1 at pp. 3–7 (1933) where the cases are noted.

[5] [1933] A.C. 289, affirming C.A. [1932] 1 K.B. 617. The effect of the decrees had been questioned in *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou* (1932) 158 L.T. 364; and admitted as effecting a dissolution in *Russian and English Bank* v. *Baring Bros.* [1932] 1 Ch. 435.

[6] Sometimes known as the corporation's "*lex domicilii*." However, this is an imprecise usage, *cf.* Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942), pp. 207–10.

[7] [1933] A.C. at p. 297. This had always been assumed to be the law, *e.g.*, *per* Scrutton L.J. [1923] 2 K.B. at p. 691.

The recognition is granted regardless of the corporation having had a branch office [8] or assets [9] in England; regardless of the majority of the shareholders having been British subjects [10]; and (crucially) regardless of there having been no settlement of the corporation's affairs.[11] This consistency is further marked by the recognition being dated from the act of dissolution rather than from the date when those concerned with the corporation's business in this country received actual or constructive notice thereof.[12] The power of dissolution can be effectively exercised by a government recognised *de facto* if the "corporate home" is within territory under the effective control of that government.[13]

It should be noted that a foreign corporation's compliance with the English provisions as to oversea companies cannot affect its corporate existence or decease, for the provisions are purely administrative and have no concern with personality, though manifestly if the English branch of a foreign corporation is registered as an English company it and the parent cannot become *commorientes*, since the existence of an English company can only be determined by English law.

The purpose of this article is to examine some of the problems to which recognition of a dissolution can give rise.[14] This examination will deal mainly with the situation where a foreign corporation has been annihilated without prior settlement of its affairs (as in the Russian cases), but many of the principles discussed will be found of more general application.

B. The Position at Common Law

I. Litigation

A dissolved corporation cannot bring an action for a "non-existent person cannot sue." [15] The corporation is legally helpless. Where a person endeavours to bring an action in the corporation's name the proper course is for the defendant to satisfy the court before trial that the plaintiff is non-existent, whereupon the action will be struck out, and all costs awarded against the solicitor who

[8] *Russian and English Bank* v. *Baring Bros.* [1932] 1 Ch. 435.

[9] *Lazard Bros.* v. *Midland Bank* [1933] A.C. 289.

[10] *Russian and English Bank* v. *Baring Bros.* [1932] 1 Ch. 435.

[11] *Lazard Bros.* v. *Midland Bank* [1933] A.C. 289.

[12] *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou* (1932) 158 L.T. 364; *Lazard Bros.* v. *Midland Bank* [1933] A.C. 289; *Burr* v. *Anglo-French Banking Corporation* (1933) 49 T.L.R. 405. *Re Russo-Asiatic Bank* [1934] Ch. 720; *Re Banque des Marchands de Moscou* [1952] 1 All E.R. 1269.

[13] *Bank of Ethiopia* v. *National Bank of Egypt* [1937] Ch. 513, esp. at p. 520; *Banco de Bilbao* v. *Sancha* [1938] 2 K.B. 176.

[14] There is little extra-judicial authority on this subject. The best general accounts are: Lloyd, *The Law of Unincorporated Associations* (1938), pp. 195–9; and Wortley, *op. cit.*

[15] *Per* Eve J., *Russian and English Bank* v. *Baring Bros.* [1932] 1 Ch. 435 at p. 443.

represented that he was retained by the corporation.[16] Likewise the corporation cannot be sued,[17] for in the absence of an existent defendant any action is purely hypothetical. The existence of the parties to a suit is a point which the court has an inherent power to investigate in order to prevent abuse of its process.[18] The power is exercisable by an appellate court,[19] and if the exercise is justified the judgment appealed from is a nullity.[20] A judgment obtained in default of the appearance of a corporation which is subsequently found to have been dissolved must be set aside when the true facts are brought to the notice of the court,[21] as must any garnishee proceedings founded thereon.[22]

The difficulties met by the courts under this head have not been with any rule of law—the law has been deemed clear—but with ascertaining as a matter of fact whether a given corporation has been dissolved. This difficulty may be enhanced when a foreign branch of a corporation which has been dissolved by the law of the country of incorporation seeks to bring an English action in the name of the parent corporation, alleging that the *lex loci negotii gesti* still attributes it with corporate personality. The allegation might be substantiated in one of two ways. Firstly by showing that the *lex loci negotii gesti* has endowed the branch with a personality distinct from that of the parent. If this status corresponds to the English conception of a corporation then the branch will be granted a *locus standi* before an English court [23] despite the parent's death. Secondly, by showing that the *lex loci negotii gesti* does not recognise the dissolution of the parent corporation [24] with whose possession of personality the branch is still identified. That this identification enables the branch to bring an action in England has been decisively denied. In *Banque Internationale de Commerce de Petrograd* v. *Goukassow* [25] the French branch of a Russian bank sought to bring an action in England. Although the Court of Appeal held the bank to have been dissolved by the Soviet

[16] *Banco de Bilbao* v. *Sancha* [1938] 2 K.B. 176 at p. 192, *per* Clauson L.J.
[17] *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou* (1932) 158 L.T. 364.
[18] *Ibid.*, at p. 366, *per* Scrutton L.J.
[19] *Ibid.*
[20] *Ibid.*
[21] *Lazard Bros.* v. *Midland Bank* [1933] A.C. 289; *Burr* v. *Anglo-French Banking Corporation* (1933) 49 T.L.R. 405.
[22] *Lazard Bros.* v. *Midland Bank* (*supra*).
[23] *Cf. Van Hellfeld* v. *Rechnitzer* [1914] 1 Ch. 748 at pp. 754–5, *per* Phillimore L.J.
[24] Nebolsine, "The Recovery of the Foreign Assets of Nationalised Russian Corporations," 39 Yale L.J. 1130 (1930) at p. 1137, gives four reasons why this may be so: (i) non-recognition of the decretal power; (ii) the decrees may not be construed as effecting a dissolution; (iii) the branch may be regarded as a *de facto* corporation existing without the decretal power's legislative competence; and (iv) non-recognition of the dissolution on policy grounds (in effect).
[25] [1923] 2 K.B. 682; also *Re Russian Bank for Foreign Trade* [1933] Ch. 745 at p. 763; Dicey, *Conflict of Laws* (6th ed.), p. 477.

decrees [26] it was urged that the action was maintainable, since under French law (owing to the French Government's non-recognition of the Soviet Government) the Soviet decrees were ineffectual, and therefore the bank (and hence the French branch) still possessed corporate personality. The immateriality of this personality in England was demonstrated by Scrutton L.J. :

> "I can understand the French courts saying: 'This company was validly created by the law of Russia, and we know of and recognise no law which has destroyed it; therefore it still exists.' But the English courts do know and recognise a law which has destroyed it, and in my opinion must apply their own *lex fori* to determine what person can or cannot sue in their courts. In my opinion, therefore, English courts are bound to treat this plaintiff bank as dissolved and incapable of suit in English courts." [27]

II. Property in England

Since a non-existent person cannot be vested with the rights of ownership, who succeeds to a dissolved foreign corporation's English property? Commonly a decree of dissolution will purport to vest the corporation property in the decretal State, but effective as such measures may be within the appropriating State's legislative competence, foreign governments cannot exercise sovereignty over property in England whether by way of confiscation or otherwise.[28] At common law, property vested in an English corporation at the time of its dissolution falls to the Crown as *bona vacantia*.[29] There seems no reason to doubt that this right extends to the property within the jurisdiction of a dissolved foreign corporation, for the Crown undoubtedly succeeds to the English estate of a foreign heirless intestate.[30] This latter presents a strong analogy, for as Romer L.J. said :

> "The right of the Crown to *bona vacantia* depends upon the fact that there is no other owner of the property claimed, and cannot depend upon the particular reasons for the existence of that fact." [31]

With the foreign corporation there is no other claimant. The corporation is dead and relations with its members severed; governmental decrees of the country of incorporation are irrelevant; and a claim by that government of a right of escheat similar to that allowing the Crown property as *bona vacantia* is likewise irrelevant

[26] Reversed on this point [1925] A.C. 150.
[27] [1923] 2 K.B. at p. 691.
[28] *Bank voor Handel en Scheepvaart* v. *Slatford* [1953] 1 Q.B. 248, and cases there cited.
[29] *Re Higginson & Dean* [1899] 1 Q.B. 325; *Re Sir Thomas Spencer Wells* [1933] Ch. 29; *Re Strathblaine Estates Ltd.* [1948] Ch. 228.
[30] *Re Barnett's Trusts* [1902] 1 Ch. 847; *In the Estate of Musurus* [1936] 2 All E.R. 1666.
[31] *Re Sir Thomas Spencer Wells* [1933] Ch. 29 at p. 59.

for it is one of those regalian claims which are ineffective outside a government's competence.[32]

The right of the Crown has never fallen for decision, but is tacitly assumed in two judgments[33] and is indicated by several dicta.[34] Professor Wortley has suggested[35] that the cases establishing the Crown's right to property owned by a dissolved English corporation are distinguishable from one where a foreign corporation has been annihilated, since in the latter case no provision has been made for the payment of creditors by a prior liquidation. This contention is respectfully submitted to be unsound. The operative factor is dissolution, not payment of creditors, and the authorities give no indication that the Crown's title is conditional upon the satisfaction of outstanding liabilities.

Two caveats must be entered to the proposition that the Crown succeeds to the English property of a dissolved foreign corporation. Firstly, Lord Atkin has opined[36] that debts owed to a corporation are abrogated by its dissolution. However, Lawrence L.J. had earlier expressed a contrary view,[37] and the point seems to be one of extreme difficulty. Secondly, the foreign government which has dissolved the corporation may well be successful if it enters a claim to the assets which is not caducary in nature, but which is founded on a rule of succession nominating the State as heir to the property of a dissolved corporation. For in the analogous case of an administration on death the State in which the deceased was domiciled has been allowed to take under such a rule as the heir entitled by the *lex domicilii* at the time of death.[38] Such a right of succession excludes a claim by the Crown, for an escheat can only operate in default of other heirs. However, this point has never been taken in a corporation case, and the validity of the analogy will have to await decision.

III. Transaction entered into after the dissolution

A corporation can only act through agents, and the history of the Russian cases shows that the English agents of a foreign corporation may continue to act in pardonable ignorance of their

[32] *Re Barnett's Trusts* [1902] 1 Ch. 847; *In the Estate of Musurus* [1936] 2 All E.R. 1666.

[33] *Re Banque Industrielle de Moscou* [1952] Ch. 919; *Re Azoff-Don Commercial Bank* [1954] Ch. 315.

[34] *Lazard Bros.* v. *Banque Industrielle de Moscou* [1932] 1 K.B. 617 at p. 641; *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405 at p. 444; *Re Banque des Marchands de Moscou* [1952] 1 All E.R. 1269 at p. 1277. See also Palmer, *Company Precedents* (16th ed.), pt. 2, p. 660. Companies Act, 1948, s. 354, is obviously not applicable; *cf.* Lord Macmillan [1936] A.C. at p. 439.

[35] *Op. cit.*, at p. 9; also 48 L.Q.R. 321 (note).

[36] *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405 at p. 427, citing 1 Bl.Comm., p. 484.

[37] *Re Sir Thomas Spencer Wells* [1933] Ch. 29 at pp. 51–2.

[38] *In the Estate of Maldonado* [1954] P. 223. Classification of the nature of such a claim seems to be a matter for the *lex causae*: *ibid.*

principal's dissolution. Can they by so acting create any relationship between the corporation and third parties after the date of the dissolution?

Private international law distinguishes two aspects of agency: the relationship between the principal and his agent, and relationships created by the agent in his dealings with third parties. The former is governed by the law with reference to which the agency is constituted.[39] The latter are governed by the law of the country where the agent acts,[40] which probably means the proper law of the contract which the agent concludes with a given third party.[41] The separation of these two relationships necessitates the classification of any problem connected with agency so that it may be introduced to the appropriate choice of law rule. To which category belongs a question relating to the termination of an agent's power to bind his principal? It would seem to be a question pertaining to the relationship created by the agent with a third party, and therefore to be governed by the proper law of the contract which the agent has concluded. The question is whether the agent's act binds his principal, and not whether he has authority so to do. Thus in the present submission an agent can create a *nexus* between his principal and a third party even though by the law governing the principal and agent relationship his authority so to do has terminated. This is not unreasonable for as Wolff pointed out[42] the third party should be able to rely on a foreign agent having power similar to that given an agent by the municipal law of the country under which he contracts. Lord Sumner, speaking of an English agent's power to bind a Russian corporation after his authority so to do had allegedly been terminated by Russian law, said:

> "I do not think it is proved that by Russian law, . . . he had no authority all this time to do on the company's behalf all that he ostensibly did for it, nor do I see any reason why the question of his authority to carry on in London the business established here should not be determined by English law."[43]

From the context it is apparent that the noble Lord used "authority" somewhat imprecisely as indicating "power" to carry on the business.

There are two situations to be considered, for the agent may act with reference either to English or to an alien system of law.

[39] *Maspons* v. *Mildred* (1882) 9 Q.B.D. 530; Cheshire, *Private International Law* (4th ed.), p. 233; Dicey, *op. cit.*, p. 710. With company officials this will almost invariably be the law of the country of incorporation: *Risdon Iron and Locomotive Works* v. *Furness* [1906] 1 K.B. 49.

[40] *Pattison* v. *Mills* (1828) 1 Dowl. & Cl. 342; *Kallenbach* v. *Lewis* (1885) 10 App.Cas. 617.

[41] Cheshire, *op. cit.*, p. 234; Dicey, *op. cit.*, p. 712.

[42] *Private International Law* (2nd ed.), p. 412.

[43] *Employers' Liability Assurance Corporation, Ltd.* v. *Sedgwick Collins & Co. Ltd.* [1927] A.C. 95 at p. 109; adopted by Romer J., *First Russian Insurance* v. *London and Lancashire Insurance Co.* [1928] Ch. 922 at p. 938.

In the first situation English law will determine the effect which the dissolution of the principal corporation has upon the agent's power [44] to bind his principal to a third party. By English law the dissolution of the principal automatically terminates the agent's power,[45] for manifestly there is no longer anyone to be bound. Even where the agent has been held out as possessing authority the better view is that cessation of his power does not depend on the granting of notice to third parties where termination is due to the principal's death [46] (which presumably includes dissolution). Thus the corporation—or rather its assets—cannot be involved in any transaction entered into by its agents after the dissolution. Post-dissolution activity can have no effect save the infliction of a personal liability upon the agent.[47] This at least where he contracts *qua* agent, but not apparently where he signs the corporation's name coupled with his own as, for example, branch manager, in which case the agreement is a nullity for the only "contractors" are a defunct corporation and the third party.[48] However, where the agent acts under a power of attorney the law stated in this paragraph may need modification.

In *Sinfra Aktiengesellschaft* v. *Sinfra, Ltd.*[49] Lewis J. held that the terminability of a power of attorney is a matter for the law of the place where it is intended to operate. If this place is England, whilst it is true that the dissolution of a corporation normally terminates a power which it has given, the Law of Property Act, 1925,[50] makes certain powers to a greater or lesser extent irrevocable. By section 126 powers of attorney given for valuable consideration and expressed to be irrevocable shall, in favour of a purchaser [51] and irrespective of notice, not be revoked by the "death, disability, or bankruptcy" [52] of the donor, and all acts performed under the power shall be as valid as if the terminating

[44] It should be noted that the rule as to the power (or want thereof) of an English agent to bind a foreign principal was never more than a presumption and is now obsolete: *J. S. Moseley (London) Ltd.* v. *Sir Charles Cunningham* (1949) 83 Ll.L.R. 141 at p. 145; also *Miller Gibb* v. *Smith and Tyrer, Ltd.* [1917] 2 K.B. 141.

[45] *Salton* v. *New Beeston Cycle Co.* [1900] 1 Ch. 43; Bowstead, *Agency* (11th ed.), p. 290.

[46] Bowstead, *op. cit.*, p. 295; Chitty, *Contracts* (20th ed.), p. 1100; Halsbury, *Laws of England* (3rd ed.), Vol. 1, p. 246; Powell, *Law of Agency* (1952), p. 311; *Blades* v. *Free* (1829) 9 B. & C. 167 at p. 171. *Cf.* Brett L.J., *Drew* v. *Nunn* (1879) 4 Q.B.D. 661 at p. 668.

[47] This can arise under two heads: (i) an agent is liable *qua* principal upon any contract which he expressly makes on behalf of a principal who is in fact non-existent: *Kelner* v. *Baxter* (1866) L.R. 2 C.P. 174; (ii) an agent is liable for breach of warranty of authority at the suit of a third party whom he has prejudiced by his conduct (however innocent) in purporting to act as agent: *Yonge* v. *Toynbee* [1910] 1 K.B. 215 esp. at p. 227, *per* Buckley L.J.

[48] *Semble* from *Newborne* v. *Sensolid (Great Britain), Ltd.* [1954] 1 Q.B. 45.

[49] [1939] 2 All E.R. 675, esp. at p. 682.

[50] 15 Geo. 5, c. 20.

[51] See s. 205 (1) (xxi).

[52] "in relation to a corporation means the winding up thereof": s. 205 (1) (i).

event had not taken place.[53] A power of this nature could be given by a foreign corporation to its English agent, and the requirement of consideration[54] satisfied by the agent undertaking the responsibility of safeguarding the corporation's English interests. What effect has the dissolution of a corporation on such a power? No section or definition in the Act is of avail. Can dissolution be treated as synonymous with "death"[55]? Or does the section not cover the case at all? It is submitted with diffidence that since the intendment of the section is to avoid prejudicing the donee and the purchaser by what would otherwise be an automatic termination, "death" should be held to include the dissolution of a corporation. Such a construction indicates that an agent may be enabled to deal validly with assets which vested in the Crown upon the principal corporation's dissolution; but this conclusion is not inconsistent with the Law of Property Act for subject to immaterial exceptions it is expressed to bind the Crown.[56] Yet even with statutory sanction the spectacle of an agent binding Crown property on the assumption that it is still vested in a non existent principal has little to commend it on the grounds of elegance. Against whom the third party could bring action to enforce his contract is uncertain since the fictional principal is given no *locus standi*.[57] Presumably the remedy would be against the Crown, whose title to the corporation property must be treated as statutorily defeasible upon the exercise of the power of attorney.

So far it has been assumed that the agent's activity (and therefore his power to bind the principal) is governed by English law. What of the situation where the agent acts with reference to a legal system whereunder either the dissolution of the principal corporation is not recognised, or the agent is regarded as having a power analogous to that granted by the Law of Property Act? Questions arising from these situations are academic. No action on the agent's contract or on a foreign judgment founded thereon could be brought against the corporation in England for it cannot be made an English defendant. The corporation's property could not be seized since it has vested in the Crown, and although the

[53] By s. 127 similar provision is made as to powers not granted for valuable consideration if the instrument of creation is expressed to be irrevocable for a specified time not exceeding one year from the date of the instrument. On these sections see: Emmet, *Title* (13th ed.), Vol. 1, pp. 223–6; Halsbury, *op. cit.*, Vol. 1, pp. 239–40; Powell, *op. cit.*, pp. 316–9; Wolstenholme and Cherry, *Conveyancing Statutes* (12th ed.), Vol. 1, pp. 443–8. None is helpful in the present context.

[54] Not defined in the Act. The accepted definition by Lush J., *Currie* v. *Misa* (1875) L.R. 10 Ex. 153 at p. 162, would seem applicable, although the section perhaps contemplates monetary consideration only.

[55] It was so treated by Stirling J., *Salton* v. *New Beeston Cycle Co.* [1900] 1 Ch. 43 at p. 49.

[56] s. 208 (3).

[57] No action would lie against the agent for breach of warranty of authority, since the Law of Property Act declares the authority not to have been revoked.

Crown's enjoyment may be fettered by an English statute it cannot be made subject to a foreign contract.

Professor Wortley has suggested[58] that those who act in England on behalf of the corporation after its dissolution may be treated as agents of necessity. The suggestion appears unsound, for the choice of law rule appears identical with that applicable to a normal agency,[59] and by English law an agent of necessity must have a principal. Here there is none. The suggestion was urged but rejected in a case where services had been rendered in England to a Russian bank after its dissolution. Vaisey J. perceived the fatal objection :

> " One is driven back to this strange notion of an agency of necessity. But an agent has first to have a principal. Where in this case is the principal? I cannot find one." [60]

IV. Estoppel

The above analysis shows that a continuation of business after a dissolution cannot (with one possible exception) affect the corporation or its assets. However, Greer J. remarked of a Russian corporation which had been carrying on business after an alleged dissolution :

> " if . . . the Rossia Insurance Company no longer exists in fact, . . . it is conceivable that it might possibly exist by estoppel against certain persons,".[61]

Whatever may be the effect of estoppel upon an agent's liabilities and attempts at self-aggrandisement (and it is hard to envisualise a situation where it could have any effect), it is difficult to appreciate how an estoppel could affect what were the corporation's assets or the invalidity of post-dissolution transactions. For example, can a defendant be estopped from denying the corporation's existence and therefore its power to appear against him when he has benefited from the contract in issue which was made at a time when all parties were ignorant of the dissolution? The denial must be allowed, for an estoppel cannot be raised where it would give a capacity which the law otherwise denies to a person.[62] In the present context it would give a dissolved corporation power to bring an action. The same observation applies to a suit by a third party against a corporation, and those interested in the corporation's affairs cannot be estopped from showing a dissolution.

V. Conclusions

It may be justifiably asked whether the rules which have been discussed do not give extraterritorial effect to a foreign government's " confiscation," for a corporation is stripped of its English

[58] *Op. cit.*, at p. 12.
[59] *Prager* v. *Blatspiel, Stamp and Heacock, Ltd.* [1924] 1 K.B. 566.
[60] *Re Banque des Marchands de Moscou* [1952] 1 All E.R. 1269 at p. 1277.
[61] *Sea Insurance Co.* v. *Rossia Insurance Co.* (1923) 17 Ll.L.R. 316 at p. 319.
[62] *Bateman* v. *Faber* [1898] 1 Ch. 144; *Leslie* v. *Sheill* [1914] 3 K.B. 607 at p. 615; *Griffiths* v. *Davies* [1943] K.B. 618.

assets and denied any control over its English affairs consequent upon the decree of a foreign power. Yet the courts have rigidly and avowedly adhered to the rule whereunder the effectiveness of a foreign government's interference with property is limited to that government's legislative competence.[63] The divestment and impotence are inexorable attributions of *English* law resulting from the recognition of the dissolution. Lord Wright clearly expressed the position :

> " no question is here involved of the extra-territorial effect of legislation, confiscatory or otherwise, since the dominant fact is the dissolution of the corporation, which depends on territorial enactments of the country of incorporation." [64]

Any discussion of the position of a dissolved foreign corporation may achieve results more theoretical than actual, for an English branch office may continue to act under the innocent assumption that its parent was still in existence. This assumption may be erroneous for one of two reasons. Firstly, the dissolution may be unknown in this country. Such ignorance is excusable in the uncertainty following a political upheaval—after its dissolution in the 1917 Revolution the Russian and English bank continued its English business for at least two years—but it affects neither the date from which the dissolution is recognised nor the invalidity of acts performed thereafter. Secondly, though notorious, the dissolution may initially have no effect in England as being the act of a government to which Her Majesty's Government had not accorded recognition. Subsequent recognition either *de jure* or *de facto* of that government endows its acts with retroactive effect before an English court,[65] thereby in the present context apparently attacking the validity of acts performed on behalf of the corporation between the date of dissolution and the date of recognition.[66]

It must be emphasised that dissolution is catastrophic. Maugham J. graphically described the English branch of a dissolved Russian bank as :

> " a submerged wreck floating on the ocean of commerce." [67]

This wreck can endanger the innocent, as was appreciated by Atkin L.J. :

> " The result of holding that [the bank] was, in fact, dissolved in January, 1918, is to make it impossible to enforce any of its rights or liabilities, and to leave in considerable peril

[63] *e.g.*, *Re Russian Bank for Foreign Trade* [1933] Ch. 745; *Re Banque des Marchands de Moscou* [1954] 1 W.L.R. 1108.

[64] *Lazard Bros.* v. *Midland Bank* [1933] A.C. 289 at p. 302.

[65] Lauterpacht, *The International Law of Recognition* (1947), pp. 59–60.

[66] In the Russian cases the dissolutions have generally been taken as occurring at a date prior to that of the recognition of the Soviet Government in 1921. Such fixation indicates the consequences stated above, but in *Civil Air Transport Inc.* v. *Central Air Transport Corporation* [1953] A.C. 70 the Privy Council held retroactivity of recognition did not operate to invalidate that which was valid in inception.

[67] *Re Russian Bank for Foreign Trade* [1933] Ch. 745 at p. 764.

> all those who in the course of banking business in the City of London have in any way, at any time after 1917, taken any part in disposing of or handling its assets; for obviously a non-existent person can give no title to anything." [68]

The common law's only mitigation of the unhappy situation which its rules have produced has been stated by Scrutton L.J.:

> "The Crown in taking treasure trove makes a liberal equitable allowance to the finder. It may be that a similar equitable adjustment amongst the creditors of Russian banks would do substantial justice." [69]

As a solution this obviously leaves much to be desired. Some amelioration of the common law rules has been attempted by statute, and attention will now be devoted to the relevant provisions.

C. The Position Under the Companies Act, 1948 [70]

I. The making of a winding-up order

The Companies Act, 1948, gives the High Court jurisdiction to order the compulsory winding up of a dissolved foreign corporation, provided that it was not a corporation registered in Scotland [71] or Northern Ireland,[72] and was not a corporation alien to either of the two countries yet which had a principal place of business therein and not in England.[73] Jurisdiction may be founded on either of two sections in Part IX of the Act.

> Section 399 (5): "The circumstances in which an unregistered company may be wound up are as follows:—
>
> (*a*) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs."

The applicability of this provision results from the section (398) defining "unregistered company" for Part IX of the Act being held inclusive of foreign corporations [74]; and from "is dissolved" being construed as "has been dissolved." [75] The clauses of section 399 (5) (*a*) were generally read as cumulative, thereby encouraging the assumption that jurisdiction could only be taken if the corporation had had a place of business in England.[76] This assumption led the

[68] *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1923] 2 K.B. 630 at p. 663.

[69] *Lazard Bros.* v. *Banque Industrielle de Moscou* [1932] 1 K.B. 617 at p. 641.

[70] 11 & 12 Geo. 6, c. 38. For convenience all references (unless there is expression to the contrary) will be to the provisions of this Act, although the majority of decisions have been upon the identical provisions of the 1929 Act.

[71] s. 220.

[72] s. 461.

[73] s. 399 (2), (3).

[74] *Re Matheson Bros.* (1884) 27 Ch.D. 225.

[75] *Re Family Endowment Society* (1870) L.R. 5 Ch. 118; *Re Russian and English Bank* [1932] 1 Ch. 663.

[76] *e.g.*, Dicey, *op. cit.*, p. 291. The assumption was founded on *Re Lloyd Generale Italiano* (1885) 29 Ch.D. 219.

courts to make somewhat fanciful attributions in order to utilise the section. Thus in *Re Tovarishestvo Manufactur Liudvig-Rabenek* [77] Cohen J. held the hotel where the directors of a Russian corporation had stayed on their annual visits to England to have been the corporation's place of business.[78] More recently the Court of Appeal was satisfied that:

> "Since Czamanski has stated that he visited England from time to time on the business of the bank and must on such occasions have stayed somewhere in England, it is sufficient that the place or places (though unspecified) where he stayed constituted the bank's place or places of business in England." [79]

The ease with which the alleged necessity can be satisfied since it requires neither permanence nor preciseness of establishment has led the Court of Appeal to opine that the section does not make jurisdiction conditional on there having been a place of business in England, so long as there is some "commercial subject-matter" therein on which the winding-up order can operate.[80] The nature of a "commercial subject-matter"—the existence of which is a question of fact—is necessarily uncertain, but the minimum requirement would seem to be the presence of assets and creditors within the jurisdiction.[81] Without anticipating a later discussion it may be remarked that strictly there can be no assets within the jurisdiction for immediately upon dissolution they all vested either in the Crown or (exceptionally) in the State decreeing the dissolution.[82]

Section 399 (5) (*a*) has been favoured by the courts, and all orders for the liquidation of dissolved foreign corporations appear to have been made thereunder. This predilection is surprising in view of section 400:

> "Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated."

This section first appeared in the Companies Act, 1928,[83] and would seem to have been inserted against the consequences of the Soviet

[77] [1944] Ch. 404.

[78] The learned judge adopted the test of "place of business" used for R.S.C., Ord. 11, r. 8, on which see Romer L.J., *Dunlop Pneumatic Tyre Co.* v. *A/G für Motor und Motorfahrzeugbau, etc.* [1902] 1 K.B. 342 at p. 349.

[79] *Banque des Marchands de Moscou* v. *Kindersley* [1951] Ch. 112 at p. 127, *per* Evershed M.R.

[80] *Banque des Marchands de Moscou* v. *Kindersley* [1951] Ch. 112. In the court below ([1950] 2 All E.R. 105) Harman J. had anticipated this opinion. It was adopted by Wynn-Parry J., *Re Azoff-Don Commercial Bank* [1954] Ch. 315 at pp. 329–33.

[81] [1951] Ch. at p. 126; [1954] Ch. 315 at p. 333.

[82] *Supra*, notes 33, 34 and 38.

[83] 18 & 19 Geo. 5, c. 45, s. 91.

decrees.[84] Yet Bennett J. whilst realising the section's probable intendment found himself unable to give it retrospective effect in order to cover the case of a corporation which had ceased business before the commencement of the Act.[85] The utility of section 399 (5) (*a*) has rendered unnecessary any direct attack on this construction, but its validity on general grounds of statutory interpretation was later doubted by Lord Blanesburgh.[86] More recently the Court of Appeal has regarded section 400 as merely expository, conferring jurisdiction in cases already covered by section 399 (5) (*a*), and containing no additional limiting factor. This conformity was achieved by the court construing the opening words of section 400 (which emphasise the necessity of "business") as being no more:

> "than a reference to the fact that some commercial subject-matter on which a winding-up order can operate is a natural and necessary requisite for the exercise of winding-up jurisdiction."[87]

The exercise of jurisdiction is discretionary, for both of the enabling sections use the permissive "may."[87a] Two observations must be made on this discretion. The possibility that the foreign government which dissolved the corporation may claim the assets upon which the winding-up order would operate is no reason for declining to exercise jurisdiction on the ground that an exercise thereof would implead a foreign sovereign. Apart from any question of whether a mere claim supports an assertion of immunity, a dictum of Lord Hatherley has an approved[88] relevance in this context:

> "There may be many cases in which a foreign government has some interest, but the other parties interested must not suffer because it is impossible to compel the attendance of one of those who might claim the fund."[89]

Despite the general rule that a creditor cannot petition for a winding-up order if his debt is disputed (the proper remedy being an action

[84] So thought Eve J., *Russian and English Bank* v. *Baring Bros.* [1932] 1 Ch. 435 at p. 444; also Evershed M.R., *Banque des Marchands de Moscou* v. *Kindersley* [1951] Ch. 112 at p. 129. The Hong Kong Companies Ordinance, 1932, s. 313, is identical to s. 400, and an order made thereunder was discussed and approved: *Dairen Kisen Kabushiki* v. *Shiang Kee* [1941] A.C. 373 (J.C.).

[85] *Re Russian and English Bank* [1932] 1 Ch. 663.

[86] *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405 at p. 416 (a codifying Act's date of commencement is "irrelevant . . . for any effective purpose.").

[87] *Banque des Marchands de Moscou* v. *Kindersley* [1951] Ch. 112 at p. 131, *per* Evershed M.R. Lord Atkin regarded s. 400 as inserted to remove doubts concerning the applicability of s. 399 (5) (*a*) to the Russian cases: [1936] A.C. 405 at pp. 424–5. On the whole topic of jurisdiction see Lipstein, "Jurisdiction to Wind up Foreign Companies," 11 Camb.L.J. 198 (1952).

[87a] Admittedly "may" is sometimes construed as a word of obligation, see Maxwell, *Interpretation of Statutes* (10th ed.), pp. 239–244.

[88] By Maugham J., *Re Russian Bank for Foreign Trade* [1933] Ch. 745 at pp. 769–70.

[89] *Larivière* v. *Morgan* (1872) L.R. 7 Ch. 550 at p. 560. See also *Sultan of Johore* v. *Bendahara* [1952] A.C. 318 at p. 343 (J.C.).

against the corporation),[90] the discretion can be exercised so as to allow a creditor to petition for the winding up of a dissolved corporation notwithstanding that his claim is contested by those concerned with the corporation's affairs.[91] The reason of this is obvious for a dissolved corporation cannot be made a defendant, and a denial of the creditor's ability to petition would leave him remedyless.

Although the problem of how to effect service of the petition upon a corporation which is to be wound up because it no longer exists presents a metaphysical rather than a procedural question, the answer seems well settled. If the corporation carried on business from an ascertainable centre in this country then service must comply with rule 29 of the Companies (Winding-Up) Rules, 1949, whereunder if there is no registered office the petition may be left at the "principal or last known principal place of business of the company, if any such can be found."[92] Maugham J. believed this rule to indicate the only method of effecting service upon a dissolved corporation,[93] but if the corporation had no recognisable place of business, or (as in the *Rabenek* case) conducted its business from an hotel, compliance therewith would be either impossible or futile. In those Russian cases where this problem could have arisen an order for substituted service by way of advertisement under R.S.C., Ord. 68, r. 6, has been made without cavil, and Harman J. has endorsed the practice.[94]

II. Consequences of the Winding-Up Order

It might be thought that a non-existent entity could not be wound up, yet Parliament has authorised such a proceeding and the authorisation demands an inquiry into the effect of a winding-up order upon the corporate decease and the consequences thereof at common law. The question was before the House of Lords in *Russian and English Bank* v. *Baring Bros.*,[95] a decision of the highest importance which may provide a framework for discussion. The appellant was a Russian bank dissolved by a Soviet decree of January 26, 1918, but which had been the subject of a winding-up order on March 8, 1932. In November, 1917, the bank had a credit with the respondents of which it sought to obtain payment, but in June, 1931, proceedings were stayed on admission of the claimant's

[90] Palmer, *Company Law* (19th ed.), pp. 377–8.

[91] *Re Russian and English Bank* [1932] 1 Ch. 663 at p. 670; *Re Russian Bank for Foreign Trade* [1933] Ch. 745 at p. 770.

[92] *Re Tea Trading Co., K. & C. Popoff Bros.* [1933] Ch. 647.

[93] *Ibid.* at p. 651.

[94] *Banque des Marchands de Moscou* v. *Kindersley* [1950] 2 All E.R. 105 at p. 110. For the form of petition see Palmer, *Company Precedents* (10th ed.), Pt. 2, p. 68, and note [1952] W.N. 170 (practice note). *Cf. Re Banque Industrielle de Moscou* [1952] Ch. 919.

[95] [1936] A.C. 405. See also *Banque des Marchands de Moscou* v. *Tovarishestvo Manufactur Liudvig-Rabenek* [1949] W.N. 308.

dissolution. After the making of the winding-up order the liquidator with the sanction of the court sought to bring a new action in the name of the corporation. The endeavour was rejected by Clauson J. and the Court of Appeal [96] on the ground that the plaintiff was a dissolved corporation which had in no way been reanimated by the winding-up order, and in consequence a further stay of proceedings was imposed. The stay was recalled in the House of Lords by a bare majority.[97]

Narrowly construed the decision is one upon statutory interpretation, and it is convenient to deal first with this narrow ground which involved the consideration of certain sections of the Companies Act.

> Section 399 (1): " Subject to the provisions of this Part of this Act any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply." [98]
>
> Section 245 (1): " The liquidator in a winding up by the court shall have power, with the sanction either of the court or of the committee of inspection,—
>
> (*a*) to bring . . . any action . . in the name of the company and on behalf of the company; ".

The Russian and English Bank had been wound up as an unregistered company and the court had sanctioned the liquidator's action. It is hard not to agree with Lord Macmillan when he said:

> " The matter is not left to implication. Here is direct legislative warrant for what has been done in the present case. . . . To me it seems clear that the legislature has in terms authorised this very procedure.[99]

This short point on construction sufficed to dispose of the case, but the broad argument of the respondents enabled Lords Atkin and Blanesburgh to survey a winding-up order's incidence upon the consequences of dissolution in English law. The argument was stated by Lord Atkin:

> " The company having at one time ceased to exist continues non-existent; that there are no words in the Act which bring it back to life, and that though you order the company to be wound up there is in fact no company in existence, and the winding up whatever it means, must proceed on that footing. . . . on the respondents' assumptions three results emerge: (1) There is no company to be wound up. (2) There are no assets of the company. (3) There are no debts of the company." [1]

[96] [1935] Ch. 120, 127.
[97] Lords Atkin, Blanesburgh and Macmillan, Lords Maugham and Russell of Killowen dissenting.
[98] See also s. 404.
[99] [1936] A.C. at p. 438; see also Lord Blanesburgh, at pp. 417–21. The dissentient Lords were unable to reach this conclusion in the absence of more express provision.
[1] [1936] A.C. at p. 425.

These contentions merit separate examination, since their refutation by Lords Atkin and Blanesburgh gives some vital clues to the treatment of problems arising in the liquidation of a dissolved foreign corporation.

(1) There is no corporation to be wound up. In English law a dissolved foreign corporation is non-existent, and any life which it receives from a winding-up order must be bestowed by the Companies Act. There is no express bestowal. However a non-existent corporation cannot be wound up, and to the argument that it is only the corporation's affairs or assets which are being wound up it may be replied that Part V of the Companies Act repeatedly refers to the winding-up of the "company." [2] Manifestly a new corporation has not been created.[3] These considerations leave alternate solutions to the dilemma. Either the legislative mandate to wind up a dissolved corporation and the powers given to render this effective are sterile and meaningless; or the dissolved corporation must be revivified. Lords Atkin and Blanesburgh adopted the latter solution:

> "I think we are entitled to imply, indeed I think it a necessary implication, that the dissolved foreign company is to be wound up as though it had not been dissolved, and therefore continued in existence. This seems to me with respect, the necessary result of saying that it shall be wound up in accordance with the provisions of the Act." [4]

This interpretation makes the provisions of the Companies Act into a statutory limitation upon the application of a system of law otherwise indicated as decisive by a choice of law rule. A dissolution effected by the law of the country of incorporation is declared irrelevant by a rule of English law.[5]

(2) There are no assets of the corporation. On the dissolution of a corporation all its assets within the jurisdiction will normally have become vested in the Crown as *bona vacantia*. Yet a winding-up order presupposes that there is property to wind up, and that such property is vested in the corporation for it is a characteristic feature of an English winding up that the property is vested in the corporation [6] and not in the liquidator.[7] The courts have solved the problem by treating the prerogative right as limited by necessary implication of statute.[8] The title which the Crown acquired on dissolution is defeated by the making of a winding-up order upon which the property revests in the revivified corporation. Where a foreign

[2] *Cf.* Lord Atkin [1936] A.C. at p. 428.
[3] *Cf.* Lord Russell of Killowen [1936] A.C. at p. 433.
[4] [1936] A.C. at p. 427.
[5] *Cf.* Lord Atkin [1936] A.C. at p. 428; also Lord Blanesburgh at p. 422.
[6] In exceptional cases property may be vested in the liquidator under Companies Act, s. 244.
[7] *Re H. J. Webb & Co.* [1922] 2 Ch. 369 at p. 388.
[8] *Re Azoff-Don Commercial Bank* [1954] Ch. 315 at p. 329; *Re Banque Industrielle de Moscou* [1952] Ch. 919 at p. 922; *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405 at pp. 426–7.

government claims the assets as " heir " under the law of the country of incorporation, there is no choice but to subject its claim to the English Companies Act whereunder provision is made for a liquidation by treating the property as revested in the revivified corporation.

(3) There are no debts of the corporation. At common law the debts of a dissolved corporation are abrogated, yet the courts have not hesitated in allowing a " creditor " of a dissolved foreign corporation to petition *qua* creditor for a winding-up order.[9] The revivification on the making of the order relates back to validate the preliminary proceedings.[10]

It should be noted that in both (2) and (3) the restoration of property or liability can only occur when the obligation has been determined or transferred by a rule of English law consequent upon the dissolution. It is the dissolution and the consequences thereof under English domestic law which are avoided by the Companies Act. Consequences dependent upon a foreign legal system which by English choice of law rules are independent of the dissolution are not avoided. By the latter are comprehended for example, seizure of corporation property situate within the competence of the appropriating State, or the termination of contractual obligations of which the proper law is the law of the terminating State.[11] However the court will give a creditor the benefit of any doubt as to whether his debt has been terminated under its proper law so as to enable him to petition *qua* creditor for a winding-up order.[12]

A corporation's claims and liabilities for the purpose of liquidation are ascertained as they exist at the date of the winding-up order,[13] and when an order is made in respect of a dissolved corporation some years after the accrual of an obligation there may be an attempt to invoke the Limitation Act. The attempt must fail so far as obligations accruing after the dissolution are concerned for time can only run during such period as a cause of action exists [14], and a cause of action presupposes a potential plaintiff and a potential defendant.[15] Whatever may be the revivifying effect of a winding-up order upon a dissolved corporation, prior to an order the corporation can appear as neither plaintiff nor defendant. During that period there is no cause of action and the Limitation Act cannot be applicable.[16]

The legislature has decreed that dissolved corporations may be wound up, and it is safer to believe in the " as if " fairyland which

[9] This was a matter of assumption: *Re Russian and English Bank* [1932] 1 Ch. 663; *Re Russian Bank for Foreign Trade* [1933] Ch. 745.
[10] Lord Atkin [1936] A.C. at p. 429.
[11] *Re Banque des Marchands de Moscou* [1952] 1 All E.R. 1269.
[12] *Re Russian Bank for Foreign Trade* [1933] Ch. 745 at p. 770.
[13] *Re General Rolling Stock Co.* (1872) 20 W.R. 762.
[14] Preston and Newson, *Limitation of Actions* (3rd ed.), p. 5.
[15] *Thomson* v. *Lord Clanmorris* [1900] 1 Ch. 718 at pp. 728–9.
[16] So held by Eve J., *Re Russo-Asiatic Bank* [1934] Ch. 720 at p. 738.

has been created than it is to ponder on the metaphysical soundness of the solution. Lord Macmillan has given warning:

> "I do not think that it is either necessary or profitable to discuss problems as to the precise legal status of a dissolved company which has been ordered to be wound up. In this connection metaphors may easily be misleading and serve only to create their own puzzles." [17]

Ignoring such enigma one may confidently assert that pre-dissolution assets may be wound up, pre-dissolution debtors sued and pre-dissolution creditors paid. The position is simple if a corporation ceases business at the moment of its dissolution, but for reasons which have been mentioned this cessation may not occur until some considerable time after the corporate decease. The unfortunate consequences which ensue at common law from a continuation of business have already been discussed, and attention must now be turned to the question of whether the Companies Act has any effect upon the situation.

III. The position of post-dissolution pre-liquidation transactions under the Companies Act

The invalidity of these transactions could introduce undesirable and unjust complexities into the liquidation proceedings. The dissolved corporation is incapable in law of giving or receiving title, and if the invalidity of purported transfers cannot be cured it is incumbent [18] upon the liquidator to recover property which has in fact passed under void transfers. Persons prejudiced by his endeavours can prima facie seek personal satisfaction from those who innocently professed to act as agents of the corporation. There appear to be two possible methods by which the difficulties could be alleviated under the Companies Act: (1) by a retroactive revivification of the corporation; or (2) by the ratification of individual transactions in the course of liquidation.

(1) *Revivification.* There are three modes in which a dissolved corporation may be revivified under the Companies Act. By section 353 (6) a company which the Registrar of Companies believed "defunct" and which he therefore dissolved by striking it off the register may be restored to the register and to life [19] if the court thinks fit. This section cannot apply to a foreign corporation. Section 352 (1) is apparently more relevant:

> "Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks

[17] *Russian and English Bank* v. *Baring Bros. & Co.* [1936] A.C. 405 at p. 423.
[18] Companies Act, s. 243 (1).
[19] The restoration is complete and retroactive: *Tyman's, Ltd.* v. *Craven* [1952] 2 Q.B. 100.

> fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

Although this section is within Part V [20] of the Act it is doubtful whether it is either pertinent or of utility. As to the first, Lord Blanesburgh has said the section:

> "Is confined to cases where the dissolution succeeds the complete winding up of the company's affairs and cannot take effect at all except at the instance or with the knowledge of the liquidator." [21]

The conditioning event has not taken place. As to the second, the House of Lords has held as a matter of construction that restoration under the section does not validate acts performed on behalf of the company between the date of dissolution and the court order.[22]

The third mode in which a dissolved corporation may be revivified under the Companies Act is (as has been shown) by making a winding-up order under either section 399 (5) (*a*) or section 400, upon which the corporation must be wound up "as if it were a company which had not been dissolved." [23] What is the extent of this revivification? [24] In *Re Banque des Marchands de Moscou* [25] Vaisey J. held it to be in no way retroactive. He therefore dismissed the claim of the plaintiff to participate in the liquidation of a Russian bank in respect of services rendered during the post-dissolution, pre-liquidation period.[26] The writer has explained elsewhere [27] the reasons which seem to him to justify taking what is respectfully submitted to be the more realistic course of holding that a winding-up order effects a complete and retroactive revivification within the jurisdiction. The proposal is inelegant, but then so is the liquidation of a dissolved corporation. Indeed Dr. Schmitthoff has criticised [28] the majority judgments in the *Baring Bros.* case as abandoning the "status theory" of corporations and thereby sanctioning the existence of a corporation in one jurisdiction but not in another. Yet

[20] Rendered applicable to foreign corporations once a winding-up order is made by s. 399 (1).

[21] *Morris* v. *Harris* [1927] A.C. 252 at p. 269.

[22] *Morris* v. *Harris* [1927] A.C. 252; followed, *Re Lewis and Smart, Ltd.* [1954] 1 W.L.R. 755.

[23] Lord Blanesburgh, *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405 at p. 421.

[24] A question posed but not answered by Lord Russell of Killowen [1936] A.C. at p. 433.

[25] [1952] 1 All E.R. 1269.

[26] An *ex gratia* payment was later sanctioned by the court: *Re Banque des Marchands de Moscou* (*No.* 2) [1953] 1 W.L.R. 172.

[27] "A Note on the Revivification of a Dissolved Foreign Corporation," 15 M.L.R. 479 (1952). Support for the argument is found in *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405 at pp. 423, 429; *Banque des Marchands de Moscou* v. *Kindersley* [1951] Ch. 112 at p. 129. That a retroactive revival is not inherently impossible is shown by *Tyman's, Ltd.* v. *Craven* [1952] 2 Q.B. 100.

[28] *Textbook of the English Conflict of Laws* (2nd ed.), p. 342. The passage is deleted from the 3rd ed.

there seems nothing wrong in such a sanction. The granting of the rights of legal personality is a matter for the legal system whereunder it is sought to exercise those rights, and their grant or withdrawal can only be in accord with the rules of that system.[29] In England :

> "The legislature can effectively say that [the dissolution] shall be ignored in a winding up of the company under its own Act. And it is ignored for the reason that any dissolution without a winding up previously completed and with creditors unpaid is an offence, an injustice to these creditors if it be permitted to defeat their claims against the company."[30]

(2) *Ratification.* Resort to this procedure[31] would generally be necessary only if a winding-up order is not treated as retroactively revivifying a corporation.[32] A general resort would bring difficulties in practice—Evershed M.R. found the consequences of a similar suggestion "well nigh impossible to contemplate"[33]—and perhaps for this reason it appears never to have been attempted.

In the course of a normal winding up the liquidator has undoubted power to ratify acts done by the company's agents at a time when they lacked power so to do.[34] However one of the limitations upon the effectiveness of a ratification is that the intended principal must have been in existence at the date of the act which is to be ratified.[35] This would seem fatal to ratification by a liquidator of acts done on behalf of a corporation between the date of dissolution and the date of winding up, since there was no one (unless the argument as to retroactive revivification is accepted) for whom the services could have been performed.

IV. Miscellaneous matters

(1) *Contributories.* In accord with the maxim "*extra territorium jus dicenti impune non paretur*" the Companies Act does not, save where explicit provision is made to the contrary, affect the rights and liabilities which a company may possess outside

29 *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405 at p. 428, *per* Lord Atkin.

30 Lord Blanesburgh [1936] A.C. at p. 422. See also the very interesting judgment of Cardozo C.J., *Petrogradsky Mejdunarodny Kommerchesky Bank* v. *National City Bank* (1930) 253 N.Y. 23 at p. 30.

31 It was suggested in this context by Eve J., *Russian and English Bank* v. *Baring Bros.* [1932] 1 Ch. 435 at p. 444.

32 If this is accepted, ratification may be useful in repairing possible non-observances of the corporation's statutes during the *interregnum*, *e.g.*, to confirm the position of directors who should have sought re-election but who have in fact continued in office.

33 *Tyman's, Ltd.* v. *Craven* [1952] 2 Q.B. 100 at p. 111.

34 *e.g.*, *Danish Mercantile Co., Ltd.* v. *Beaumont* [1951] 1 All E.R. 925.

35 *Kelner* v. *Baxter* (1866) L.R. 2 C.P. 174; Halsbury, *op. cit.* (3rd ed.), Vol 1, p. 176. In *Foster* v. *Bates* (1843) 12 M. & W. 226 and *Campanari* v. *Woodburn* (1854) 15 C.B. 400 it was held that a personal representative can ratify acts done on behalf of a principal who was at the time of acting dead, but it is difficult to support the decisions: Powell, *op. cit.*, p. 310.

England.[36] A winding-up order cannot affect property situate without the jurisdiction, and in practice orders for the winding up of foreign corporations have been expressly confined to the English assets.[37] Whether there is any liability on the members of a dissolved foreign corporation to contribute in the English liquidation thereof would seem to turn on the correct application of this limiting principle. The point has not arisen in any of the Russian cases because apart from the practical difficulties involved in ascertaining and tracing those who in fact were members,[38] the members appear to have been holders of fully paid up bearer shares.

The contributories in the liquidation of an unregistered company are described in the Companies Act, s. 401 (1):

> " Every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, . . . and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid."

The ascertainment of those who are liable to contribute to the adjustment of members rights *inter se* can only[39] be achieved by a reference to the corporation's statutes. If on demand being made a member protested that the dissolution had terminated his membership, he could not deny that he had been a member of the corporation which was being wound up as if it had not been dissolved, and that the Companies Act referred to the " members " thereof. Yet despite this apparent liability the point is largely of speculative interest. A share (even a bearer share[40]) is situate where it is transferable or can be effectively dealt with as against the corporation,[41] *i.e.*, where a share register is kept. Admittedly this proposition is mainly founded on revenue cases, but it has been stated in general terms by Tomlin J.:

> " The company is an English company with a registered office in England and a register of shareholders in England, and it is upon the English register alone that the shares of . . . the company can be transferred. Where then are the shares

[36] *New Zealand Loan and Mercantile Co.* v. *Morrison* [1898] A.C. 349 at pp. 357–8 (J.C.); *Bulkeley* v. *Schutz* (1871) L.R. 3 P.C. 764; *Bateman* v. *Service* (1881) 6 App.Cas. 386.

[37] *e.g.*, *Re Matheson Bros.* (1884) 27 Ch.D. 225 at pp. 230, 231; *Re Commercial Bank of South Australia* (1886) 33 Ch.D. 174 at pp. 178–9.

[38] *Cf. Re Banque Industrielle de Moscou* [1952] Ch. 919 at p. 923.

[39] For it is the original corporation which is being wound up, and the statutes are the only rules applicable thereto: *cf. Pickering* v. *Stephenson* (1872) L.R. 14 Eq. 322 at p. 339; *Bateman* v. *Service* (1881) 6 App.Cas. 386 at p. 389 (J.C.); *Risden Iron and Locomotive Works* v. *Furness* [1906] 1 K.B. 49; Lindley, *Companies* (6th ed.), Vol. 2, p. 1227.

[40] *Colonial Bank* v. *Cady* (1890) 15 App.Cas. 267 at p. 283; Cheshire, *op. cit.*, pp. 470–1. But *cf. The Manufacturing Co.* v. *Frederick Huth & Co.* (1929) 11 B.Y.I.L. 235.

[41] *Brassard* v. *Smith* [1925] A.C. 371 at p. 376 (J.C.).

situate? I think I am concluded by authority from saying that the shares are situate otherwise than in England." [42]

Where the share is situate there also must be found any liability (or benefit) dependent thereon:

> "The shares being situate in England, can it be said that the debt to which a declaration of dividend upon these shares gives rise is situate elsewhere than in the habitation of the shares? Is the tree in one close and the fruit in another? I think not." [43]

Since the Companies Act only embraces property in England it is submitted that there is no jurisdiction to claim payment of any liability resultant from the holding of shares in a foreign corporation for inclusion in the English liquidation thereof, unless the shares were effectively transferable as against the corporation in England.[44]

(2) *Claims against the corporation.* Section 316 of the Companies Act provides:

> "In every winding up . . . all debts payable on a contingency, and all claims against the company, present or future certain or contingent, ascertained or sounding only in damages, shall be admisssible to proof against the company."

Accordingly Maugham J. has stated the general rule that:

> "In the winding up here all creditors, whether British or foreign, who can prove their debts have equal rights." [45]

Yet in at least two cases dealing with the liabilities of foreign corporations mention is made of "English" creditors,[46] and Lord Atkin declined to decide whether a liquidation is for the benefit of "English" creditors or for creditors "generally." [47] However Wynn-Parry J. has recently ordered the liquidation of a dissolved Russian bank on the petition of four Norwegian banks which were in fact the only creditors shown to exist.[48] With respect, this would seem to indicate the correct view, for even if a precise meaning could be found for the phrase "English" creditors, there is no principle whereunder distribution could be limited to such a class.[49] The winding up is of the corporation, not of its "English" affairs, although for jurisdictional reasons the winding-up order only affects

[42] *London and South American Investment Trust* v. *British Tobacco Co.* [1927] 1 Ch. 107 at p. 118.
[43] *Per* Tomlin J. [1927] 1 Ch. at p. 119.
[44] *Cf.* an *obiter dictum* of Romer J., *Re Jarvis Conklin Mortgage Co.* (1895) 11 T.L.R. 373, from which could be inferred willingness to justify an order for the liquidation of a foreign corporation on the ground that uncalled share capital was "held" here. The position is very uncertain, and any definite assertion is perhaps unjustified.
[45] *Re Vocalion (Foreign), Ltd.* [1932] 2 Ch. 196 at p. 207.
[46] *Re Commercial Bank of South Australia* (1886) 33 Ch.D. 174 at p. 198; *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1923] 2 K.B. 630 at p. 648.
[47] *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405 at p. 428.
[48] *Re Azoff-Don Commercial Bank* [1954] Ch. 315. See 3 Int. & Comp.L.Q. 506.
[49] There is no such limitation in an administration on death: Dicey, *op. cit.*, p. 811; *Re Kloebe* (1884) 28 Ch.D. 175.

corporation property situate in England. It should be remembered that "foreign" claims may not be admissible in an English liquidation for reasons independent of the debtor corporation's dissolution, *e.g.*, as having been destroyed by a recognisable measure of confiscation,[50] or as being unenforceable by action in England.[51]

(3) *Distribution of surplus assets.* None of the Russian liquidations had yet shown a balance after the payment of creditors, but the possibility cannot be ignored. Normally the English liquidation of a foreign corporation is treated as ancillary to the one which may be expected to take place in the country of incorporation, and any surplus assets are transferred to the principal liquidator.[52] This transfer—as on the completion of an English administration of a deceased's estate[53]—is one of courtesy and not of obligation, for neither an administration nor a liquidation operates as an universal transfer of property. Yet where the English liquidation is occasioned by an annihilation under the law of the country of incorporation there is no principal liquidator to whom the surplus could be paid. Seemingly recourse must again be made to Part V of the Companies Act.

> Section 265: "The court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto."

This section seems applicable even though there is a clause in the winding-up order saving assets to the Crown as *bona vacantia*. Such a clause must be read subject to the Companies Act, and can operate only upon the exhaustion of the statutory provisions as to winding up (of which section 265 is one) the application of which is the paramount purpose of the winding-up order.[54] Those who are "entitled" as members must be ascertained by reference to the corporation's statutes. The liquidator cannot allege that the dissolution has deprived the corporation of corporators for the corporation is being wound up as if it had not been dissolved, and there is statutory sanction for payment of those "entitled." Yet there may be a difficulty if membership of the corporation has been attacked not only by dissolution but by an independent measure confiscating the shares.[55] A share together with its appendant rights and liabilities is situate where it can be effectively dealt with against the corporation,[56] and if this situation is within the legislative competence of

[50] *Re Banque des Marchands de Moscou* [1952] 1 All E.R. 1269; *ibid.* (No. 2) [1954] 1 W.L.R. 1108. See 3 Int. & Comp.L.Q. 689.

[51] *Re Delhi Electric Supply and Traction Co., Ltd.* [1954] Ch. 131.

[52] *Re Commercial Bank of South Australia* (1886) 33 Ch.D. 174 at p. 178.

[53] *Re Lorillard* [1922] 2 Ch. 638 at p. 644.

[54] *Re Banque Industrielle de Moscou* [1952] Ch. 919.

[55] *Cf.* Decree of the Council of People's Commissaries on the Confiscation of Joint Stock Capital of the Late Private Banks, s. 2 (Petrograd, January 23, 1918). Cited [1923] 2 K.B. at p. 675.

[56] *London and South American Investment Trust* v. *British Tobacco Co.* [1927] 1 Ch. 107 (*supra*).

the decretal power the destruction of the share is recognisable in England. Does this recognition debar a "member" from claiming as a person "entitled" in the English liquidation? On principle since the expectancy of participation flows from a holder's property right in his share the answer must be yes, for if the share be destroyed so must also the expectancy and hence the claim to be "entitled."[57]

Although the Soviet Government has stood aloof from the litigation caused by its decrees,[58] the government effecting a dissolution may conceivably claim the surplus assets. It would appear difficult to substantiate such a claim. If the claim is under a decree of confiscation—*i.e.*, some measure legally independent of the dissolution—then the rule is settled that English courts will deny the decree any effect in relation to property situate without the enacting government's legislative competence.[59] If the claim is justified by reference to a paramount right akin to that granting property to the Crown as *bona vacantia*, then the same principle of territorial effectiveness operates, for a foreign power cannot exercise caducary rights in England.[60] However, if the claim is vested upon a provision in either the corporation's statutes or the general law of the country of incorporation endowing the State with a right of beneficial succession as opposed to a claim by paramount right, then it should be admitted under section 265. The claim is that of a person entitled by a right of succession, and to such a claim the principle of territorial effectiveness has no application.[61]

If it be concluded that there are no persons entitled, or if such persons cannot be found, the surplus assets are clearly *bona vacantia*: either because the Crown's title (defeated for the purpose of the liquidation) is revived[62]; or under Companies Act, s. 354, which provides that where a company is dissolved on completion of its liquidation any property still vested in or held on trust for the company shall be deemed *bona vacantia*.[63]

Conclusions

Although Lord Cave described the consideration of decrees dissolving corporations on a basis of complete confiscation as a "not agreeable

[57] It is arguable that since the right to participate in the distribution of an English fund is primarily given by an English statute the right must be situate in England and is therefore unaffected by the confiscation of the share.

[58] It expected to receive all the property of the dissolved corporations wherever situate: 3 Int.L.Q. 621 (book review). Maugham J. envisualised a claim being made: *Re Russian Bank for Foreign Trade* [1933] Ch. 745 at pp. 768–9.

[59] *Bank voor Handel en Scheepvart* v. *Slatford* [1953] 1 Q.B. 248.

[60] *Re Barnett's Trusts* [1902] 1 Ch. 847; *In the Estate of Musurus* [1957] 2 All E.R. 1666.

[61] *Re Maldonado* [1954] P. 223.

[62] *Cf. Re Banque Industrielle de Moscou* [1952] Ch. 919.

[63] *Re Azoff-Don Commercial Bank* [1954] Ch. 315 at p. 329. The Crown may disclaim under s. 355 (b). On the effect of a disclaimer see Elliott, "Land without an Owner," 70 L.Q.R. 25 (1954).

task "[64] the courts have adhered to juristic principle with a devastating disregard for the realities of the situation. Law as a mirror of fact has been sacrificed to the lure of metaphysic, since the consequences of fixing a dissolution upon a certain date may reflect not fact but theory. It is respectfully submitted that it was unfortunate to accept unreservedly the dissolution of a foreign corporation which had assets or at least a branch office in this country. Some limitation was desired by Lord Finlay:

> "The London branch has existed for a long time, it has carried on business here, there are many English shareholders, liabilities to British subjects have come into existence. . . . To affirm the defence set up by the defendants in the present case would be to make it impossible for the branch to get in its assets and discharge its liabilities. In all fairness the branch must have the right to use the name of the bank for the purpose of getting in its assets."[65]

This view has much to commend it, but later rejected[66] on grounds of logic rather than convenience it has been tacitly ignored. The theory of revivification which the courts have evolved from the somewhat equivocal provisions of the Companies Act in order to remedy the imperfection of the common law, is uncertain in nature and difficult of application. Possibly the ideal solution would be for the legislature—which did not see fit to alter the position in 1948—to declare that the dissolution of a foreign corporation should upon becoming notorious afford no more than a ground for an immediate compulsory liquidation in this country.

Michael Mann *

[64] *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1925] A.C. 112 at p. 123.

[65] *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1925] A.C. 112 at p. 141. Graveson, *Conflict of Laws* (2nd ed.), p. 413; Wolff, *op. cit.*, p. 305, are prepared to deny recognition on policy grounds.

[66] *Russian and English Bank* v. *Baring Bros.* [1932] 1 Ch. 435 at p. 442.

* LL.B., PH.D., Barrister-at-Law; Assistant Lecturer in Law at the London School of Economics and Political Science.

COMPARATIVE ASPECTS OF UNDISCLOSED AGENCY *

Among these persons who act for another, special attention should be paid to the agent of an undisclosed principal. It may be that he does not belong to this group at all if we apply exclusively the distinction based on the doctrine of declared intentions between those who act in their own name and those who act in the name of another. The result of this principle, if actually applied, must be that the undisclosed principal has no direct contractual relationship with the third party, because the agent's contract is for him a *res inter alios acta*.

But the outward appearance of the agent's acts *vis-à-vis* the third party is not the only matter to be taken into account. The agent's conduct and the intentions of the third party are not the only bases of the contract. Exclusive preoccupation with them leading to the conclusion that the relationship between the principal and agent can have no effect upon the third party, is not a logical necessity.† On the contrary, there are good reasons based on the fact that the transaction is legally destined for the principal for applying also the slogan *qui facit per alium est perinde ac si faciet per se ipsum*.

Because of this conflict of protecting various opposing interests, every system of law must consider how far it is just that the relationship between an undisclosed principal and an agent should influence the contract made by the agent with a third party, or—to put it the other way—how far it is necessary that the fact that the agent acts apparently in his own name alters the effects of any contract he makes on behalf of his principal. This is the crucial question. As Jambu-Merlin [1] has pointed out: "C'est ici que se trouvent vraiment le centre et l'intérêt essentiel au point de vue du droit comparé de la théorie de l'undisclosed agency" and Würdinger [2] considers it "den Höhepunkt des rechtlichen Problems."

It appears reasonable that the effects of such an undisclosed agency should fall midway between, on the one hand, the contracts made by a direct agent, who is under no personal liability at all and acquires no rights for himself, and on the other hand, the

* See also my article on "The Undisclosed Principal" (1953) 16 M.L.R. 299–317.

† But *cf.* R. Powell, *The Law of Agency*, 1952, p. 310: "Logically, the conception of authority demands a continuing consent of the principal to the agent's acts on his behalf."

[1] In Hamel, *Le contrat de Commission*, Paris, 1949, p. 320.

[2] *Geschichte der Stellvertretung (agency) in England*, Marburg, 1933, p. 429.

contracts concluded by the chain of three independent principals. Because of the different concepts of contract in Continental and in English law, the approach of both legal systems is not the same. For the solutions must differ according to whether a law justifies the legal effects of a contract only by reason of the declared intentions of the parties, or by reason of consideration too. Moreover, the main concepts of agency, contract, etc., are not the same in the various countries, and France, Germany, and most of the other countries have a special commercial law, distinct from their civil law.

(A) France

The general principle of agency, as it is laid down in article 1984 of the Code Civil, requires an agent to act in the name of his principal, in order that the latter may acquire rights against and incur liabilities towards the third party directly, without the personal intervention of the agent. (" Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom." [3]) The majority opinion concludes from this that a commission agent (" Commissionnaire ") who acts according to article 94 of the Commercial Code " en son propre nom ou sous un nom social pour le compte d'un commettant " can create no direct relationship between his principal and the third party. The agent, acting in his own name, is exclusively personally bound. " La quasi-unanimité de la Doctrine affirme, que le commissionnaire agissant proprio nomine est seul partie au contrat." [4] So also agreements between agent and principal, that the agent should act in his own name but on behalf of his principal (case of the so-called " prête nom ") have legal effects exclusively as between principal and agent and not for the third party.[5] Only the actions arising between agent and principal provide the means of transferring the effects of the external transaction to the principal.

But this general principle is mitigated by such theories as " fraude à la loi " and " apparence." [6] Moreover, special rules attenuate its severity. The most important of these, according to the prevailing opinion,[7] is the " action oblique " of article 1166

[3] The Code Civil characterises " mandate " as a contract (art. 1984 par. 2) creating obligations between principal and agent (arts. 1991, 1998). Consequently it does not yet distinguish clearly the internal relationship between principal and agent from the external relationship between principal and third party. See Rabel, *The Conflict of Laws*, III p. 122.

[4] B. Starck in Hamel, *Le contrat de Commission*, Paris, 1949, p. 149; C. de Paris, 3.12.1902. (D.P.904.2.418); Cass.Req. 2 juin 1903 (D.P.904.1.242).

[5] Escarra, Manuel Dr. Com., II, Nr. 1062, Lyon-Caen et Renault, III, Nr. 479/8; but compare P. Lerebours-Pigeonnière: *Du prête-nom, mandataire ou gérant d'affaires agissant en nom propre*, thèse, Caen, 1898, et B. Starck in J. Hamel, p. 154.

[6] See Rouast, *Cours de Droit civil approfondi* (1947–8) p. 191.

[7] Escarra, *ibid.*, Lyon-Caen et Renault, Nr. 480.

Code Civil, which enables creditors to enforce the rights of the agent, as their debtor, against the principal, and the principal to enforce them against the third party, when the agent has failed to do so. Other legal writers [8] prefer an analysis in terms of assignment, arguing that " l'action oblique " cannot apply in these cases, because the principal is not a creditor of the agent until the agent has received the goods from the third person, and from this moment the agent has no right of action against the third party. Therefore the better approach, according to this view, is by way of a voluntary assignment, which is supplemented by a judicial subrogation, if the agent refuses to enforce or transfer his rights.

Moreover, some decisions have stated [9] that the third party has a personal right of action against the principal, where the agent has transferred the proceeds of the transaction to the principal on the basis of the *actio de in rem verso*.

But above all, the idea that there is also a direct relationship between the third party and the principal finds expression in the French law of Bankruptcy. If the selling commission agent goes bankrupt before payment, the principal can claim the price directly from the third party by " une action en revendication du prix." This rule of Article 575 al. II C. com. has a corresponding application to the buying " commissionnaire." If he goes bankrupt the principal, it is argued, is able to claim delivery from the third party and if the goods have already been delivered to the agent, the principal is able to claim them, provided they are still identifiable. This result is generally approved, but the reasons given in support of it differ. Ripert [10] and Escarra [11] treat it as an application of real subrogation, rejecting the former theory by Lyon-Caen and Renault, which was based on the idea that, at least in the relationship between commission agent and principal, the principal has to be the real contracting party " pourvu que les tiers soient désintéressés dans la question et que le commissionnaire n'ait pas quelque intérêt légitime " (*cf.* Article 95 C. com. concerning the commission agent's lien). Although it is true that this question directly affects third persons also, the reason that Lyon-Caen gives seems nevertheless to be the decisive one: namely, that the " commissionnaire " has acted as the representative of the principal, and if no privileged interests object : " la vérité doit reprendre son empire." [12] The idea of real subrogation comes in the end to the same conclusion, for it has always been adopted [13] to overcome the " normal " rules of contract, through which the conflict of interests

[8] Aubry et Rau (4th ed.), IV. 415, p. 662.
[9] Paris 6.8.1850, D. 1854.5.483. Cass.Req. 5.5.1879. D. 1879.1.463. Rouen, 25.6.1904, D. 1904.2.192.
[10] Traité élém. Dr. Com. Nr. 2776.
[11] Manuel Dr. Com. t. II, Nr. 1561.
[12] *Traité de droit commercial*, Vol. III, Nr. 481.
[13] E. Wahl, *Vertragsansprüche Dritter im französischen Recht*, 1935, pp. 169 *et seq.*

between persons connected by "indirect agency" can be solved. It is for the same reasons, that the vast majority [14] holds that the buying agent acquires rights directly for his principal, and the selling agent never acquires property, but only transfers property from his principal to the third party.

(B) Germany

The primary German rule, as laid down in section 164, par. 2, of the Civil Code, is that an agent acting in his own name, or without disclosing the fact that he is acting as such, does not acquire rights or incur liabilities directly for his principal. The agent alone acquires rights and is exclusively personally liable; there is no legal relationship between the principal and the third party. The agent must make it clear to the third person that he acts not only in the principal's interest but in his principal's name to make him immediately the exclusive party. Nevertheless the courts in Germany have, even more than in France,[15] mitigated the harshness of this rule, which is based only on the openly *declared* intentions of the agent.[16] The less the third party's interests call for knowledge of the principal's identity, the less the courts require that he should have been able to discern on whose behalf the agent was acting.[17] Legal writers,[18] going still further in this direction, have developed the doctrine of "whom the matter concerns," according to which the legal effects of a bargain in a cash sale directly affect the principal, who supplies the money, although the agent has not mentioned that he is an agent for him or has left open the question of who will be the party to the contract, provided that the third party has no special interest in establishing a relationship with the agent. But German law retains, like French law, the principle that the third party has only one debtor and has no right of election between the agent and the principal. It only accepts the possibility of an agent acting at the same time [19] for himself and for a principal.

The commercial code repeats in a more detailed manner than French commercial law the rules of the civil code as regards the "*Kommissionär*" (commission merchant), who is considered the

[14] Lyon-Caen et Renault, *Traité de droit commercial*, Vol. III, 497, 505; B. Starck in Hamel, *Droit de Commission*, p. 152: "A cet égard, nul doute n'existe. . . ."

[15] In France, it was for long insisted that the agent's acting in the name of his principal had to be expressly declared and could not appear only from the circumstances. (*Cf.* Aubry et Rau, Vol. VI at 415, p. 180, Popesco-Ramniceano, *De la représentation dans les actes juridiques en droit comparé*, p. 247.)

[16] See also section 1357 BGB (wife's implied power of agency without the request of acting in the name of the husband).

[17] RG. 100, 190; RG. 109, 167; RG. 140, 229.

[18] E. J. Cohn, *Das rechtsgeschäftliche Handeln für denjenigen den es angeht*, 1931.

[19] RG. 127, 105.

leading example of an "undisclosed agent." To be more precise, he acts as a "commission merchant" which, so far as the third party is concerned, means that, even when he acts in his own name, it is well known that he has a principal behind him; in other words, that the existence of his principal is not totally undisclosed. Although, moreover, the economic function of a "*Kommissionär*" is similar to that of a broker in English law,[21] he does not "normally" create direct rights and duties between his client and the third party. Indeed, section 392 I HGB expressly states that claims arising out of transactions concluded by a commission merchant cannot be enforced by his principal against the debtor until they have been assigned to him. According to section 384 the principal has only the right to demand at any time that the agent should so assign such claims, subject however to the provision that the agent is entitled to pay himself out of the proceeds of any claim arising out of business transacted by him for his principal any sums due to him, before paying his principal or the principal's creditors (section 399).

But this general rule of section 392 I HGB is considerably weakened by the provision that in the principal's relationship to the commission merchant's creditors, the principal is treated even though no "assignment" has yet taken place as if he were the creditor of the third party. Claims acquired by the agent in his own name are deemed to belong to the principal as between these two persons or their creditors (section 392 II HGB). But this exception applies only in favour of the principal. The third party, on the other hand, must regard his debt as payable to the agent in so far as he cannot set off any claims owed to him by the principal, unless the agent has assigned his claim to the principal.[22]

That means, in particular, that the general body of the *Kommissionär's* creditors cannot seize his rights against a third party. The principal is entitled to a right of severance (section 43 Konkursordnung) [23] and is entitled to object to a levy of execution on the *Kommissionär's* claims against third persons (section 771 ZPO).[24] Moreover, the leading principle of this section 392 II HGB is also used in a number of other instances. It applies in particular when the other party to whom a commission merchant sells is also the commission merchant's creditor and has a claim against him apart from the sale concluded on behalf of the principal. The fact that he is also the third party does not exclude this.

A very vexed question arises when the third party has paid the money. Can section 392 II HGB also be applied in this case, so that the money can be treated in the same way as the agent's claim? Undoubtedly section 392 II only mentions the claims of the agent.

21 Martin Wolff in *Manual of German Law*, p. 264.
22 RG. 121, 178.
23 RG. 32, 42.
24 RG. 84, 216.

but there are good reasons for its application by process of analogy.[25] Modern legal writers tend to prefer this solution to all explanations, based on a hypothetical intention of the agent and the third party, which rarely exists in reality. They justify equal treatment of goods and claims by the identity of the interests affected. The same justification for special treatment of the *Kommissionär's* claims justifies similar treatment also for either the goods or the money which the third party pays on these claims.

Does this principle of subrogation apply by analogy also in the reverse case, when the third party is the creditor? If so, the third party would, in the event of the agent's bankruptcy, have a right of severance corresponding to the agent's right to an indemnity from his principal. But the prevailing opinion [26] rejects this extension. It sees no decisive justification for such a privilege for the third party who contracts with a commission merchant. A third party who enters into a contract with an "indirect" agent who converts himself into a principal (section 404 HGB) is also not able to sue a third person.[27]

(C) Scandinavian and Swiss Law

(1) Under the Scandinavian law of agency [28]—which is generally regarded as belonging, like the Swiss law, to the Germanic group of laws [29]—the question whether the third party is entitled to a right of severance in bankruptcy proceedings against the agent in respect of the agent's claims against the principal, is even more controversial. Although section 56 II of the *Lag om kommission* denies this

[25] For this result: Schmidt-Rimpler in Ehrenberg's *Handbuch*, Vol. V, 2 p. 938; Düringer-Hachenburg Komm. z. HGB at 384. A 72 *et seq*; Staub at § 383 A 31 *et seq;* Capelle in *Festschrift f. Raape*, p. 335. Against that: Baumbach-Duden at 392, 3 D HGB, Martin Wolff in *Manual of German Law*, Vol. I, p. 264.

[26] Jäger, *Kommentar zur Konkursordnung*, 6–7, Auf I. s. 23, note 14; Capelle, p. 327; but compare Schmidt-Rimpler in Ehrenberg's *Handbuch*, V I, p. 1062, note 51a and Rabels *Zeitschrift* 1937, p. 748.

[27] According to the statement of R. Müller-Erzbach, *Die Grundsätze der mittelbaren Stellvertretung*, Berlin 1905, pp. 63 *et seq.*, the German law of marine insurance shows a remarkable similarity to the principles of English law of undisclosed agency (and marine insurance). Here the insurance taker (agent) acts in his own name on account of the assured (principal). But the assured acquires rights against the underwriter. The assured is also liable for payment of the premium, if the insurance taker fails to pay, for, according to s. 812, if the party taking the insurance becomes insolvent and has not received the premium likewise from the assured the underwriter may likewise claim payment of the premium from the assured. The insurance taker is also empowered to dispose of the rights which are stipulated in the contract for the assurer, for he may, without production of a power of attorney from the assured, make use of the powers reserved to the assured by the contract of insurance, and may receive and enforce payment of the sums insured. (Ss. 886 *et seq.*)

[28] The mother-law of the Scandinavian legislature is the Swedish law from 18/IV/1914 "*om kommission, handelsagentur och handelsresande*," which was followed by the very similar Norwegian law of 30/VI/1916 and Danish law of 8/V/1917. Here only the Swedish law is quoted provided that the rules are the same.

[29] Jambu-Merlin in Hamel, *Le contrat de Commission* (1949) p. 334.

right—in contrast to the German Commercial Code, which does not explicitly mention this matter [30]—Scandinavian legal writers [31] even more than German writers express dissatisfaction with this result, and consider that in such circumstances the fact that the commission agent acted for an undisclosed principal should also be taken into account.

In the converse case, where the third party is the debtor, Scandinavian law protects the principal in the same way as German law. According to section 61 of the *Lag om kommission, handelsagentur och handelsresande*, the agent's creditors cannot levy execution of a judgment against the agent on the agent's claims against third parties—unless the agent also has claims against his principal, from which he has a right to deduct his commission. But Scandinavian law goes much further. Although by section 60 I of the *Lag om kommission*, etc., only the agent is entitled to enforce claims against the third party, this principle is cut down in some very important respects. According to the rules of civil agency, the principal is generally entitled to proceed directly against the third party, except where the agent has a lien against him, but under the rules applying to the commercial *kommissionär*,[31a] the principal has this right only if the third party does not fulfil his duties punctually or the agent is in breach of his duty to render accounts, or acts dishonestly against him, or becomes bankrupt (section 57). In these cases there is no need for an assignment, the principal gets his right without any circuity. He has only to announce to the agent his intention of proceeding himself against the third party in contrast to the German law, where he must demand an assignment and, if necessary, bring an action against the agent.

In so far as the principal is entitled to proceed against the third party, he alone is the creditor.[32] But these rights are derived from the *kommissionär*, who always acquires them in the first instance. The third party who is unaware of the transfer from the *kommissionär* to the principal, is still protected if he pays the *kommissionär*. In the converse case, where the third party pays the principal, although the claims have not been assigned, he is also protected if

[30] Scandinavian law goes even further than German law in developing casuistically a number of special rules for the commission agent. This is explained by the fact that the general rules of contract are to a large extent not codified in Scandinavia. The possibility of making reference to other codes was therefore very limited.

[31] H. Ussing, *Aftaler paa formuerettens omraade* (2nd ed., 1945) p. 355, Hult, *Om Kommissionärsavtalet* (1936) pp. 27 *et seq.*

[31a] The Swedish expression *kommissionär* corresponds to the German word *Kommissionär*.

[32] This question is not decided expressly by the code, which has left it in the hands of legal writers. The greater number of them take the principal for the creditor mostly by an anticipated transmission (so Hult 253, Lamm, *Svensk Juristidning* 1920, 83) while Ussing p. 361 and Rabenius TFR, 1918, 340 regard the agent as the actual creditor and the principal as the eventual creditor.

he relies on a deed by the *kommissionär* saying that the principal is entitled to proceed, or when the *kommissionär* has clearly suffered no damage. (Sections 59 and 63.)

Another example of greater protection for the principal in Scandinavian law is found in section 64 I 2 which entitles the third party to set off against the *kommissionär* a claim against the principal, provided that the *kommissionär* has not a secured interest.

Finally Scandinavian law goes definitely further than German law in acknowledging a direct relationship between the third party and the principal by the clear rule (section 53 II) that in the case of the buying *kommissionär*, the principal immediately acquires ownership of the goods. He becomes the proprietor not only in relation to the *kommissionär's* creditors, but to everybody. The agent is sufficiently protected by his legal lien. The fact that the transfer of property is not disclosed, is less important in Scandinavian law, for in contrast to German law it applies the principle of consensual transfer (in German law also the principle that property can only pass on transfer of possession is largely modified). This is a further example of the lesser regard which Scandinavian law pays to the intentions of the parties than do the other continental codes, and its avoidance of the hypothetical intention of the parties. It is submitted that this is a preferable approach.

(2) Swiss law, unlike German law, but like the English system, contains no special commercial code, although there is a certain number of special rules applying only to mercantile traders. Like Italian law [33] it treats all questions concerning mercantile agents in the general Code of Obligations (Obligationenrecht).

Like German law it distinguishes sharply between a " direct " and an " indirect " agency.[34] (Avl. 32 III. O R.) But it goes further than the German Code in considering the objective privileged interests of the parties. This is shown from the outset by article 32 II of the revised Code of Obligations (1911), concerning the " direct " or " open " agency. This states that an agent can incur direct legal effects for his principal without acting in his name, if the third party has no privileged interest in dealing only with the agent. Here the Swiss Code has adopted the ideas of the German writer Max Rümelin,[35] which are nowadays also increasingly followed by German courts.

Thus the buying *Kommissionär* can immediately acquire property for his principal, provided that it is immaterial to the third party to whom the ownership will be transmitted. Therefore article 401, III, O R—adopted from the old Code of Obligations which contained no

[33] Code civil, 1942.

[34] See v. Tuhr-Siegwart. *Allgemeiner Teil des Schweiz. O R*, pp. 303, 335. T. Guhl, *Schweizer Obligationenrecht*, 3rd ed., pp. 112–3.

[35] Arch. ziv. Prax., 93, 225.

article like 32 II—and which gives the principal a right of severance in case of the agent's bankruptcy—has lost most of its value.

But Swiss law goes still further. It states a very important exception to this principle of separating the relationship between agent and principal and agent and third party. By Art. 401, I and II O R, the principal *ipso jure* acquires his agent's rights against the third party the moment he has fulfilled his contractual duties to the agent. This solution of a *cessio legis* corresponds to the similar Swedish rule in protecting the principal not only in his internal relationship to the agent but also *vis-à-vis* third persons —without regard to the agent's intentions or declarations and approaches at the same time closely to the English institution, including the agent's lien.

Although, *e.g.*, the requirements of the agent's lien in English law cannot be fulfilled by every kind of undisclosed agent, the main difference between English and continental law is that what in the one system forms the exception is the rule in the other, and vice versa. Both laws admit, starting from opposed principles so many exceptions that the contrast is diminished so far, that both extensively accord in practical results.[36] Even this distinction of rule and exception is eliminated, if Goodhart and Hamson [37] are right in saying that "the English doctrine of the undisclosed principal is perhaps best considered as a primitive and highly restricted form of assignment." Although this explanation cannot cover all the English rules, it is worth noting as indicating how closely the practical results of laws may coincide despite widely different theoretical starting points.

However, this statement of practical effects does not solve all the problems. It remains to decide, specially in regard to legislative policy, which approach is preferable. In any system the typical situation should be covered by the general rule and the peculiar one by the exception.

The main reason for starting from the idea of agency is that this gives the nearest approach between representation of rights and representation of interests. This may bring out more clearly the numerous situations in which one man may act for another, and may make it easier to understand the distinction between these various situations and the stages by which they shade into one another.

On the other hand, the fact that the third party can sue the principal only if he discovers him, is in favour of the continental system. Moreover, the approach by way of the declared intentions of the parties corresponds to the approach in the general law of contract. It may be that the attitude of legislators will depend in

[36] Schmidt-Rimpler in Ehrenberg's Handb. V, 1, 604, 922 *et seq.*, und Rabel's *Zeitschrift*, 1937, 744–53; E. Rabel, *The Conflict of Laws*, Vol. III, pp. 132 *et seq.*

[37] (1932) 4 *Cambridge Law Journal* 320, 352.

the end upon the view they take of the whole institution of undisclosed agency. The decisive factor may be whether the institution is itself regarded as an exception and one not to be sustained, or one that should be favoured. The starting point shows then the institution to which the legislators trend.

W. Müller-Freienfels *

* Professor of Law in the University of Marburg.

NEGLIGENCE AND INTEREST

A COMMENT

A RULE requiring the plaintiff in an action of negligence to show that the defendant owed him a duty in respect of the particular interest for injury to which he claims damages would, as Mr. Machin suggests in his article "Negligence and Interest," [1] limit the scope of the *Polemis* rule by confining liability to the direct consequences of the defendant's conduct to that particular interest. But it is doubtful whether such a method of limiting liability for the consequences of an act would indeed lead to satisfactory decisions on remoteness of damage.

It is gradually coming to be realised that it is impossible to formulate a mechanical rule of remoteness that will yield satisfactory results in all cases. Nearly fifty years ago Street wrote: "It [*i.e.*, remoteness of damage] is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. . . . The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other." [2] The same view was expressed by Andrews J. in his dissenting judgment in the *Palsgraf* case [3]: "The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former. . . . What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . . The problem of proximate cause is not to be solved by any one consideration. It is all a question of expediency. There are no fixed rules to govern our judgment. . . . There is in truth little to guide us other than our common sense." [4]

This view has not in the past commended itself to the majority of judges and writers. Lawyers are understandably reluctant to

[1] 17 M.L.R. 405.

[2] *Foundations of Legal Liability* (1906), Vol. 1, p. 110.

[3] *Palsgraf* v. *Long Island Railroad Co.* (1928) 248 N.Y. 339. See Goodhart, "The *Palsgraf* Case," *Essays in Jurisprudence*, p. 129.

[4] (1928) 248 N.Y. 339 at pp. 351–4. Edgerton, "Legal Cause," (1924) U.Pa. L.R. 211, 343, suggests that the essential problem is whether the consequences are "justly attachable" to the defendant's conduct. Dr. Ellis Lewis (Winfield on *Tort*, 6th ed., p. 99) concludes that "the solution is based upon some inarticulate idea of policy, some intuition which comes from long training and a comprehensive judgment in working out the rules of law." See also Eldridge, *Modern Tort Problems*, 205–12.

admit that their science does not enable them to predict what the courts do, and both judges and writers are prone to take refuge in rules which, in spite of their guise of certainty, do not in fact facilitate prediction at all.[5] The rule that, once culpability is established, the wrongdoer is responsible for all the direct consequences of his acts is an example of this tendency. The rule signifies, it is true, that one may be liable for consequences which one could not reasonably foresee, but it does not enable one to predict how far liability for unforeseeable consequences extends. The rule is sometimes said to be confined to "immediate physical consequences,"[6] but even here it is recognised that the law "cannot take account of everything that follows from a wrongful act. . . . In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons."[7] The result therefore is that the rule that one is liable for direct consequences is in reality no more illuminating for the purposes of prediction than the statement that one is liable for all the proximate consequences of an act.

Professor Prosser, whose views on the law of tort must be accorded great respect even on our side of the Atlantic, has recently been converted to the opinion that remoteness of damage "is utterly incapable of reduction to any formula."[8] In his view, the only deduction that can be made from the cases is that the consequences must not be "too improbable, too fantastic,"[9] and he recognises that the decision is based ultimately on considerations of justice and policy. He concludes: "It has been, I think, always the formula, the generalisation which has been at fault, in a field where it seems impossible to generalise at all. 'The mule don't kick according to no rule.' Direct causation, the scope of the risk, the unforeseeable plaintiff, the last human wrongdoer, the distinction between cause and condition, limitations of time and space, substantial factors, natural and probable consequences, mechanical systems of multiple rules, and the rest of the rigmarole of 'proximate cause,' all have been tried and found wanting in situations that inevitably arise to which they do not and cannot provide a satisfactory solution. There is no substitute for dealing with the particular facts, and considering all the factors that bear on them, interlocked as they must be."[10]

Though it may often appear just to a court that a person should not on the facts be responsible for unforeseeable consequences, nevertheless to adopt the rule suggested by Mr. Machin would at other

[5] Compare the various theories put forward to explain frustration of contracts, all of which are equally useless as a basis for prediction.
[6] *Liesbosch Dredger* v. *Edison S.S.* [1933] A.C. 448 at p. 461, *per* Lord Wright.
[7] *Ibid.*, at pp. 460–1, *per* Lord Wright.
[8] "Palsgraf Revisited" (1953) 52 Michigan L.R. 1 at p. 24. *Contra* Prosser, *Torts*, p. 319.
[9] *Ibid.*, at p. 27.
[10] *Ibid.*, at p. 32.

times prevent the court from reaching a decision felt to be just. For example, he distinguishes between a plaintiff's interest in freedom from direct physical injury and his interest in freedom from injury through nervous shock, and puts forward this distinction in explanation of the decision in *Bourhill* v. *Young*,[11] on the basis that the motor-cyclist in that case owed the fish-wife no duty of care in respect of her interest in freedom from injury through shock, since that interest was not foreseeably affected by his negligence, though he would, as Denning L.J. pointed out in *King* v. *Phillips*,[12] almost certainly have been liable if she had been hit by a flying wheel, highly improbable though it may have been. But Denning L.J. was, it is submitted, right in rejecting this explanation, and in preferring to explain the shock cases as turning upon the rule that injury suffered through nervous shock is too remote if the defendant could not have foreseen it.[13] In the case of nervous shock the effect of either rule is the same—the defendant is not liable unless he could reasonably have foreseen injury through shock—but in other situations, especially when the defendant has been guilty of gross negligence, the court may not wish to limit his liability to the damage he has caused to those interests of the plaintiff to which he might have foreseen damage.

Let us adapt the facts of the *Palsgraf* case and suppose that a porter on a railway platform negligently knocks a package from the arms of a passenger while assisting him to board a train.[14] The package in fact contains fireworks, though the porter has no reason to suspect this, which explode upon hitting the platform, injuring the passenger's leg and damaging his trousers. Applying the rule suggested by Mr. Machin, the porter would owe the passenger a duty of care only in respect of his interest in freedom from injury to his chattels, since that is the only interest to which the porter could reasonably foresee damage, so that the passenger could recover only the value of the fireworks and the cost of repairing his trousers. Yet it seems that the New York Court of Appeals in the *Palsgraf* case would on such facts have held the porter liable for all the consequences of his acts,[15] and it is suggested that an English court, on the authority of *Re Polemis*,[16] would do likewise.

It must be confessed that English law has adopted an extraordinarily ambiguous position on the question of liability for unforeseeable consequences. The *Polemis* rule is based on the perfectly understandable policy that, as between himself and an innocent plaintiff, a defendant who has failed to exercise the care for others of a reasonable man should be responsible for the unforeseeable consequences of his conduct to the plaintiff. The rule is admittedly one

[11] [1943] A.C. 92.
[12] [1953] 2 W.L.R. 526, at 532.
[13] *Ibid.*, at p. 533.
[14] See Prosser (1953) 52 Michigan L.R. at p. 22.
[15] *Ibid.*, at p. 23. (1928) 248 N.Y. 339, 346, *per* Cardozo C.J.
[16] [1921] 3 K.B. 560.

of strict liability, but it is not on that account improper or unfair, any more than other instances of strict liability. The actual decisions in *Re Polemis* and *Smith* v. *L. & S. W. Ry.*[17] do not strike one as outrageous. As against the *Polemis* rule, however, there is the modern rule of the tort of negligence, established by the House of Lords in *Bourhill* v. *Young*,[18] under which the plaintiff must show that the defendant owed him personally a duty of care, the result of which is that a plaintiff can never recover unless the defendant might have foreseen some damage to him. There is no getting away from the fact that the modern doctrine of the relativity of negligence is inconsistent with the basis of the *Polemis* rule.[19] On the actual facts of the case the decision in *Re Polemis*[20] would survive the requirement that a duty be owed to the plaintiff personally, but the same cannot be said of *Smith* v. *L. & S. W. Ry.*,[21] at least on the view of the facts taken by Kelly C.B., Channell B. and Blackburn J.,[22] since the plaintiff there was outside the area of foreseeable danger and so, on the authority of *Bourhill* v. *Young*,[23] would be unable to establish a duty owing to him. And yet the decision in favour of the plaintiff in *Smith's* case does not strike one as unjust. The *Polemis* rule is, as we have remarked, a rule of strict liability to the extent that a defendant is held responsible for consequences he could not have foreseen, and it is difficult to appreciate the logic of a condition that its application should depend on foresight of injury to the plaintiff personally. Consistent with the policy underlying the *Polemis* rule, the law should be that foresight of injury gives rise to a duty towards persons generally to take reasonable care, the defendant being liable, in the event of the breach of that duty, for all the direct consequences of his acts.[24] Under such a rule the defendant could be held liable, in a proper case, not only

[17] (1870) L.R. 6 C.P. 14.

[18] [1943] A.C. 92.

[19] This was the burden of a previous article by the present writer in *Current Legal Problems*, 1952, at p. 189, in which, on the basis of such inconsistency, the authority of the *Polemis* rule was questioned. The writer recants now from that suggestion, and directs his criticism instead at the modern doctrine of the relativity of the duty of care in negligence, on the ground that the latter doctrine may on occasion prevent the court from arriving at a just decision.

[20] [1921] 3 K.B. 560.

[21] (1870) L.R. 6 C.P. 14.

[22] *Ibid.*, at 20, 21, 22.

[23] [1943] A.C. 92.

[24] This was the view of Andrews J. (dissenting) in the *Palsgraf* case: "The proposition is this. Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to someone being the natural result of the act, not only that one alone, but all those in fact injured may complain . . .": (1928) 248 N.Y. 339 at 350. It would also seem to be implicit in the dicta of Kelly C.B., Channell B., and Blackburn J. in *Smith's* case.

for unforeseeable damage to the plaintiff, as in *Re Polemis*, but also for damage to an unforeseeable plaintiff, as in *Smith* v. *L. & S. W. Ry.*[25]

In view of the reasoning in *Bourhill* v. *Young*,[26] it is perhaps vain to expect the House of Lords to abandon the rule that a duty towards the plaintiff is dependent on foresight of damage to the plaintiff personally. But, upon the assumption that the courts should be free in a suitable case to impose liability for unforeseeable consequences, one is bound to resist the further limitation upon the freedom of the court which would follow from a rule that a duty is owed only in respect of those interests of the plaintiff to which the defendant might have foreseen damage.

It should also be noted that the rule suggested by Mr. Machin would result in an unnatural distinction between liability in negligence and liability in trespass. By reason of the recognition of the plea of inevitable accident as a defence to an action of trespass, it has been thought that the only practical distinction between the two torts is in the onus of proof, the plaintiff in an action of negligence having to prove negligence, while in an action of trespass the burden is on the defendant to show that he took reasonable care. But the rule suggested by Mr. Machin as applying to an action of negligence could not be extended to an action of trespass, since the plaintiff need show no duty of care, with the consequence that the defendant would be liable for all the direct consequences of his trespass, even to interests to which he could foresee no injury. One can hardly commend a rule which could make the scope of a defendant's responsibility for unforeseeable consequences turn upon the antiquated distinction between direct and consequential injuries.[28] The extent of liability for unforeseeable consequences is ultimately a question of policy and justice, and therefore cannot turn on distinctions between the archaic categories of our law of torts. The dispute that has long raged on the problem of remoteness of damage is attributable to a refusal on the part of judges and writers to recognise that it is impossible to formulate a mechanical rule which will lead to satisfactory results in all cases. In one case justice may demand that the defendant should pay for unforeseeable consequences, while in another the court may excuse him from liability for consequences which were clearly foreseeable.[29] The solution to such a problem is

[25] (1870) L.R. 6 C.P. 14.

[26] [1943] A.C. 92.

[28] The limitation would also be inapplicable to an action of nuisance, even in those cases where, as in trespass, the defendant can excuse himself upon proof that he and those he is responsible for took reasonable care. See also the recent decision of the Court of Appeal in *Wormald* v. *Cole* [1954] 1 Q.B. 614 on liability in cattle trespass.

[29] *e.g.*, *Weld-Blundell* v. *Stephens* [1920] A.C. 956. It has frequently been overlooked that Lord Sumner in this case adopted the criterion of direct consequences as more restrictive, on the facts of the case, than the test of reasonable foresight: see pp. 981–86; *Current Legal Problems* (1952), 204–6.

to formulate a rule which honestly recognises the dependence of a decision on the court's discretion. Somewhat paradoxically, the fault of the rule that one is liable for all the direct consequences of one's acts is that, by use of the word " direct," it suggests a certainty and absence of dependence on the facts of a case that is both untrue and undesirable. But it is almost certainly too late in the day to choose another, unless we go back to blessed uncertainties of " proximate cause." [30] The actual formula adopted is unimportant so long as its inherent uncertainty is recognised.

Douglas Payne *

[30] *Cf.* Prosser, *op cit.*, 32: " I doubt that all the manifold theories of the professors really have improved at all upon the old words ' proximate ' and ' remote,' with the idea they convey of some reasonable connection between the original negligence and its consequences, between the harm threatened and the harm done."

* Lecturer in Law at University College, London.

STATUTES

Housing Repairs and Rents Act, 1954

Landlord and Tenant Act, 1954

The search for justice as between landlord and tenant has led to a long series of Acts covering alike residential premises, whether furnished or unfurnished, and business properties, large and small. The legislation has mostly been piecemeal, designed to cope with individual situations rather than to produce a coherent system and it has tackled the problems sometimes with a kind of rough justice and sometimes with an attempt to achieve a more elaborate and meticulously fair solution. The creation of Rent Tribunals by the Furnished Houses (Rent Control) Act, 1946, illustrates the former method of approach, while the provisions of Parts II and III of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951, are an example of legislation which, though on the face of it far-reaching, is so complicated that it is little known and rarely invoked.

The two new Acts in this sphere which lawyers had to digest during the Long Vacation do not in general fall within the category of simple attempts at rough justice. They each add quite a considerable chapter to any book on landlord and tenant. Yet neither of them provides in any sense a code in itself. Each is an attempt to deal with certain specific problems and each, it may be added, includes a number of sections, of quite considerable importance, amending the existing law in various ways. Whether in the end they make a very substantial contribution to social justice remains to be seen.

It is not proposed here to summarise these Acts in any detail. The Stationery Office has produced a series of booklets explaining the most important provisions and several new books are already available while the established textbooks are being revised. Rather it may assist if some of the practical aspects of the Acts are considered and a spotlight is turned on some of the miscellaneous amendments which may well escape notice while attention is focused on the repairs increase and other topics which have been widely publicised.

Housing Provisions

Part I of the Housing Repairs and Rents Act, 1954, is perhaps of more concern to local authorities than to the general reader. It is satisfactory that it should be considered that the time has come for local authorities to put in motion again large-scale plans for the demolition of unfit houses. This satisfaction is tempered by the consideration that the Act contemplates the temporary patching up of many houses which *ex hypothesi* cannot be made fit at a reasonable cost. It used to be a source of irritation before the war when some

authorities, having acquired unfit houses at site value, continued to draw rent from them and appeared to be in no great hurry to demolish them as required by statute. This practice has now been legalised.

Another source of irritation used to be the lack of a definition of " unfitness " which resulted in the existence of varying standards in different parts of the country. Attempts were made in by-laws and local Acts to supplement the Housing Act, 1936, in this respect. Now such local variations must be disregarded and section 9 enumerates the matters to which " regard shall be had " in determining whether a house is unfit or not. This is not of course to define unfitness, but a house cannot be classified as unfit unless it is so far deficient in one or more of these matters as to be not reasonably suitable for occupation.

Under section 9 of the Housing Act, 1936, notices requiring repairs to unfit houses are served on the person " having control of the house," *i.e.*, the person receiving the rack-rent. There have been many cases on the question of who should bear the ultimate cost. Where various people have interests under leases the county court is now given, by section 10, a new power to apportion the cost among them as may be just having regard to their repairing obligations, the length of their respective terms, the rent payable, etc. It does not seem very clear what type of case this section is meant to cover as usually where there is a chain of leases there will be express repairing covenants and, although the county court judge has apparently power to override them in apportioning these expenses, the remedy of damages for breach of covenant is not taken away. In cases where there are no express repairing covenants, *e.g.*, a letting and subletting of a house on a periodic tenancy, the section may be of use but in any case its effect will have to be considered whenever there is a dispute on liability. There is no corresponding provision where the notice is served not under the Housing Act, 1936, but under the nuisance provisions of the Public Health Act, 1936.

There are a number of amendments of the Housing Acts. From the point of view of the private owner the most important is probably the enlargement of the power to make improvement grants. If however the proposed improvement consists of conversion into two or more self-contained flats, the owner will do well to think twice. For if he effects the conversion without the grant, the house will become decontrolled, while, if he accepts the grant, the house will remain controlled (if it is within the Rent Act limits) at a rent fixed by the local authority.

Repairs Increase and Cost of Services Increase

The repairs increase is perhaps the best-known creation of these two Acts, although in practice it is another increase—the cost of services

increase—which is causing the greater consternation among tenants. The two provide a remarkable contrast. The former requires ten sections and two schedules to give it effect. It involves the service of elaborate notices and envisages several different kinds of application to the county court or a rent tribunal. With the latter the parties are invited in a single section to agree on the amount or submit the question to a rent tribunal. No notices of increase are required. The two increases have also some features in common. Unlike the existing increases under the Rent Acts, they may take effect during the currency of a contractual tenancy. A person who takes a lease for a fixed term is therefore no longer safe against increases during the currency of the term. Neither of these increases is allowed if the standard rent is fixed by reference to a post-1939 letting. The justification for each is the increase in costs since 1939.

The basic idea of the repairs increase is not very complicated. The landlord having satisfied himself that he has spent the necessary amount on repairs in the past and that the house is now in good repair and reasonably suitable for occupation, completes a notice of increase raising the rent by twice the " statutory repairs deduction " and two declarations, all on prescribed forms, and waits for the money to come in. The tenant for his part can challenge the landlord's assertion as to past repairs in the county court or get a certificate of present disrepair from his local authority and dare the landlord to sue him. But this simple basic scheme is overlaid with refinements. The tenant may be responsible for some of the repairs. If so, the landlord will only get a proportion of the increase. The proportion must, it seems, be agreed or settled by the county court *before* the notice of increase can be completed. (Landlords in practice are apparently serving notices of increase inserting their own figure but this may well result in the notice being declared bad at some future date.) Then there is a " stopper," a maximum beyond which the rent cannot be increased. But in calculating this sum certain components of the rent have to be disregarded rates, increases in respect of improvements and any part of the rent which represents payment for furniture or services. This last item again has to be settled by agreement or determined (this time by a rent tribunal) before the notice of increase can be completed. This creates a further risk if the form is completed with what the landlord considers to be the right figure. Thus before he can serve a notice of increase the landlord may have to make two applications, one to the county court and one to the rent tribunal.

The landlord may elect not to be deemed responsible for internal decorative repairs at the cost of losing a third of the increase, the amount he has to have spent on past repairs being correspondingly reduced. A pretty problem has arisen here. Must the " stopper " be applied to find the permitted increase and a third taken from the resulting figure or is the landlord entitled to two-thirds of the full

increase provided that his reduced increase does not bring the recoverable rent above the "stopper"? The prescribed form of notice of increase is drafted on the assumption that the former is the correct view, but the weight of opinion seems to be that the form is wrong and that the Minister has misconstrued the Act.

The tenant has his difficulties too. He may suspect that the past repairs are war damage for which the landlord has been or will be reimbursed. He has only twenty-eight days to make his investigations and decide whether to challenge the declaration in the county court. If he obtains a certificate from the local authority, the landlord can still sue him for the full rent and he will then have to decide how far to incur expense in maintaining the view of the sanitary inspector of the local authority against the landlord's experts. Furthermore, he must decide how much rent to withhold. This will grow progressively more difficult. The tenant is entitled to withhold the repairs increase and also the 15 per cent. and 25 per cent. increases allowed if the premises are subject to old control. But already in many cases it is impossible to know whether any and if so what portion of his rent represents these old increases, and in a few years' time it will be equally difficult for a new tenant to know whether his rent includes a repairs increase. The new form to be inserted in his rent book under the Rent Restrictions Regulations, 1954, ought to tell him, but if past experience is any guide, the form, if there at all, will only be properly completed in a small minority of cases. The power to suspend increases under the 1920 and 1923 Acts became a dead letter long ago and the same fate seems likely in time to overtake the powers under the new Act.

The cost of services increase produces pounds where the repairs increase produces shillings, but it is left, in default of agreement, to the mercies of a rent tribunal. One might have thought that at least it would be free from complications. But here too, it seems, it was impossible to leave well alone. Landlords sometimes provide services which they are not expressly bound to do under the terms of the lease. They are entitled of course to withhold such services or to agree to be bound in return for an extra rent on the basis of a transfer of burdens (*Asher* v. *Seaford Court Estates, Ltd.* [1950] A.C. 508). But nevertheless the new Act provides that the landlord may obtain an increase of rent in respect of increase in the cost of services actually provided. Any subsequent change of such services will be treated as a transfer of burdens. This provision leads to difficulties. Must the services have been provided at the time of the letting which fixed the standard rent? Or if these services have been performed intermittently, with what must the present cost of them be compared? Since the landlord can in any case obtain the whole cost of such services if the tenant wishes them to be continued, it is not clear why he should seek to recover only the increase in the cost under this provision.

OTHER AMENDMENTS OF THE RENT ACTS

Exempted authorities (ss. 33, 34)—All houses of local authorities are now outside the Rent Acts, whether or not a Housing Revenue Account is kept in respect of them and whether they are subject to old or new control. The same exemption is granted to development corporations, housing associations and housing trusts subject to the jurisdiction of the Charity Commissioners. There have been cases of local authorities evicting or threatening to evict their tenants on what may seem capricious grounds, such as the tenant wanting to cultivate his own garden, but no doubt the pressure of public opinion through the Press was thought to provide an adequate safeguard. The exemption does not extend to subletting. The standard rent of the subtenancy is based on the rent under the head tenancy. There is a novel provision where the interest of the head landlord ceases to belong to an exempted authority. With certain exceptions the standard rent is then fixed on the basis that the house is subject to new control, but any party interested or proposing to acquire an interest can apply to the local authority to fix a new standard rent. There is no guidance as to whether the local authority is under any duty to act judicially or even to inform any of the other parties concerned before it reaches a decision. This measure appears to have been insufficiently considered.

Decontrol of new houses (s. 35)—Houses the erection or conversion of which into separate or self-contained dwellings was completed after August 30, 1954, are not subject to rent control unless an improvement grant for the work was obtained under the Housing Act, 1949. This is the first measure of decontrol introduced since the war. Furnished lettings of new houses will still be controlled under the Furnished Houses (Rent Control) Act, 1946, so that the position may arise that it will be possible to charge more for such houses unfurnished than furnished.

Powers of Rent Tribunals (s. 36)—Where the rent tribunal determines or has already determined that the reasonable rent for a dwelling-house is higher than the standard rent, the higher rent will now become the standard rent. In the case of a past decision a notice of increase is required, but in either case the higher rent may take effect during the currency of a contractual tenancy. There will be few to dispute the justice of this amendment.

Premiums on Assignment (s. 38)—One of the injustices under the 1949 Act was that a tenant was not allowed to charge a premium on assignment even if he himself had had to pay a lawfully demanded premium as an assignee before that Act came into force. The Housing Repairs and Rents Bill as originally drafted contained a clause to remedy this position but in committee a new clause was substituted permitting any tenant to charge a premium on assignment if the tenancy was originally granted for a term exceeding

twenty-one years. This was an agreed clause passed without discussion, but it seems to provide a very haphazard type of justice. It does not remedy the former injustice unless the lease exceeds twenty-one years, it enables a tenant who has got the benefit of a controlled rent at the landlord's expense (for the landlord cannot charge a premium) to make a profit out of it, and it opens the door to evasion as a landlord may grant a long lease to an associate who will then assign it at a premium.

Protection of subtenants (s. 41)—It has been held in *Wright* v. *Arnold* [1947] K.B. 280, *Cow* v. *Casey* [1949] 1 K.B. 474, and *Knightsbridge Estates Trust, Ltd.* v. *Deeley* [1950] 2 K.B. 228, that if a head tenancy is outside the Acts, *e.g.*, because the rateable value is too high or because the rent of the head tenancy is less than two-thirds of the rateable value, a subtenant has no protection against the head landlord when the head tenancy comes to an end even if as between tenant and subtenant there is a controlled tenancy. There may be other reasons why the head tenancy is outside the Act and to such cases the principle will presumably equally apply. But at any rate in the two specific cases mentioned the view has been widely held that these decisions ought to be overruled. Section 41 now deals with the case where the rateable value of the whole premises is too high. It does so in rather a roundabout way by providing that the subtenant is to have the same protection as if the head landlord had let the sublet part and the remainder of the premises separately for the like purposes as under the superior letting and at rents equal to the just proportion of the rent under the superior letting. Thus, the section gives no protection where the rent under the head lease is less than two-thirds of the rateable value. This latter case is for some reason left to the Landlord and Tenant Act, 1954, which does by section 15 abrogate the rule in *Knightsbridge Estates Trust, Ltd.* v. *Deeley*, *supra*, but only if the head lease is for more than twenty-one years. Once again therefore the piecemeal patching process produces rather haphazard justice.

Protection of tenant's family (s. 42)—Before the Act, if a tenant died leaving a widow who was not residing with him neither she nor any other member of the tenant's family could succeed as statutory tenant. Now if the widow is disqualified by non-residence, another member of the tenant's family who has the necessary qualifications may step in. Parliament did not think fit to take the opportunity to revoke the rule against double succession.

Abolition of agricultural certificate (s. 43)—If a farmer let a cottage to someone not in his employment and subsequently required the cottage for an agricultural worker he could get possession on production of an "agricultural certificate." This rule was modified by the Defence Regulations where the tenant was also an agricultural worker employed by someone else and it is now abolished. The farmer can still get possession if the cottage was let by him to the

original tenant in consequence of his employment, provided the court thinks it reasonable to make the order.

Increase for rates (s. 14)—It was sometimes complained that local authorities were slow in sending out rate demands and accordingly the landlord only obtained his increase some time after the rates had in fact gone up. Now if the tenant is already a statutory tenant the increase takes effect from the next rent day after the notice is served and it may include a demand for six weeks arrears of increase. If the tenant is a contractual tenant the increase takes effect from the rent day next after the contractual tenancy comes to an end, and no arrears can be claimed.

Defence Regulation 68CB (s. 15)—The Act prepares for the final demise of this regulation, which has in fact since been revoked. For some reason it was never used to any great extent, although no snags were ever discovered in its operation and it offered an excellent opportunity for an owner who was discouraged from letting rooms in his house by the thought that he might never be able to get rid of an uncongenial tenant. There was, no doubt, just after the war a fear that if you told a local authority that you had rooms to let, they would promptly requisition them.

STATUTORY TENANCY AFTER A LONG LEASE

The object of Part I of the Landlord and Tenant Act, 1954, is to give security of tenure to tenants occupying premises under a long lease at a ground rent when the lease comes to an end and to relieve them from some of the burden of dilapidations. The scheme is introduced in preference to any policy of leasehold enfranchisement. Once again there is nothing really complicated about the basic idea. The tenant is entitled to a statutory tenancy at a reasonable rent unless the landlord has specific grounds for possession. The premises are to be brought not into a perfect state of repair but into a reasonable state, and, in so far as the disrepair is due to the tenant's breaches of covenant, he is to be liable to refund the cost of the repairs, but is allowed to pay it by instalments. Everything is to be settled by the county court in default of agreement.

One would have thought that it would have been possible to provide for a single application to the court which would decide at one hearing whether the tenant was entitled to a statutory tenancy and if so on what terms as to initial repairs and otherwise. Having given the tenant his rights, it could have been left to the parties to negotiate and reach agreement out of court if they could. Instead of that Parliament has decided to stand behind the parties' backs and conduct the negotiations on each side for them. Instead of the usual negotiations by solicitors' letters and interviews it is all done by notices on prescribed forms, and if the parties fail to carry out the routine ordained for them, their labour is in vain. For instance if the landlord serves a "landlord's notice proposing a statutory

tenancy " the tenant must reply electing to retain possession within two months; otherwise he may lose his statutory tenancy unless a " qualifying condition " is fulfilled at a particular date. The landlord in his turn once he has served the notice must either reach agreement or bring his proceedings in the county court within a fixed period or his original notice becomes of no effect and he has to start all over again. Similarly if the landlord chooses a " notice to resume possession " the tenant must reply in time or he endangers his position. The landlord, too, must bring his application by the proper date or his notice becomes of no effect. And if the court thinks he ought not to have possession, it cannot there and then fix the terms of a statutory tenancy. It simply dismisses the application and the landlord is sent back to the beginning. It is a mixture of ludo, happy families (where you have to hand back the card if you forget to say thank you) and chess (with the draftsman pushing all the pieces around !).

The height of absurdity is reached when there is a chain of leases. On the footing apparently that it would take more than five years to sort out the complications of the Act, a landlord who is himself a lessee with a term of less than five years longer than the tenant's to run is not regarded as competent to negotiate or litigate. One must go higher. The " competent landlord " when found acts at his peril unless he gets the consent of all other landlords before he makes any important move. However provision is made for an ancillary application to the court (after an exchange of notices) for leave to dispense with the consent of the recalcitrant mesne or superior landlord to the service of a notice by the competent landlord. This is but one of no less than thirteen distinct kinds of application to the county court which can be made under the sections dealing with long leases alone !

The " competent landlord " is not the landlord for all purposes: the tenant may have to negotiate with one, pay his rent to another and possibly make payment to a third in respect of initial repairs. No wonder that to cope with such a situation it was found necessary to invent a new monstrosity, an " immediate mesne tenancy " (Sched. V, para. 11 (6)). There seems to be no possible justification for all this elaboration.

One feature of this Act which is hard to understand is that the tenant who is unfortunate enough not to get a statutory tenancy is given no relief at all against a claim for dilapidations.

Business Premises

Part II of the Landlord and Tenant Act, 1954, gives the tenant of business premises in most cases quite considerable advantages as compared to the Landlord and Tenant Act, 1927. Thus: —

(1) His right to a new lease or to compensation does not depend on establishing goodwill nor need he and his predecessors

have carried on business for five years. A weekly tenancy is sufficient. Only a tenant with a fixed term of three months or less is excluded, and even then there are exceptions.

(2) He need not serve a notice or take any action until the landlord serves a notice on him. Under the 1927 Act tenants were very frequently out of time in claiming compensation or a new lease.

(3) He is entitled to six months' notice even if he has only a weekly tenancy.

(4) He cannot be forced to take a new lease if he does not like the terms ordered by the court.

(5) He is entitled to successive tenancies and not just to one renewal.

As against these advantages the amount of compensation instead of being based on the value of the goodwill is fixed at the rateable value of the premises, or twice that amount if the business has been carried on for fourteen years or more. It may be that in many cases the tenant will do better with this small bird in the hand rather than having to chase the cat, the rat and the dog (not to mention the rabbit) in the bush of adherent goodwill (see *Whiteman Smith* v. *Chaplin* [1934] 2 K.B. at pp. 49, 50). But in other cases the limit on compensation may involve a serious loss. And the tenant is not entitled to compensation unless he has made an unsuccessful application to the court for a new lease. Thus even if the tenant is convinced of the justice of the landlord's claim for possession, he must go through the motions of an application and he may have to pay not only his own but his landlord's costs before he can obtain his rather meagre dues.

On the whole however, the machinery of this part of the Act seems to be reasonably simple, although there are again complications involving notices and proceedings if there is a chain of leases. A difficulty which sometimes arose under the 1927 Act was that the tenant might be an individual while the business was carried on by a one-man company in which he held most of the shares. In such cases the tenant could only get a new lease in exceptional circumstances (*Pegler* v. *Craven* [1952] 2 Q.B. 69; *Scott-Bushe* v. *London Investment and Mortgage Co.* [1953] C.L.Y. 1983 (C.C.)). This awkward rule, which was neatly circumvented in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951, s. 27, will still apply under the Landlord and Tenant Act, 1954, although if the tenant is one of a group of companies and the business is carried on by another of the same group, protection is given (s. 42).

One class of tenant is badly hit by the new Act without any justification, that is the tenant of a combined shop and living accommodation within the financial limits of the Rent Acts. Under the old law he had a choice of remedies. Either he could rely on the

Rent Acts or he could claim a new lease under the 1927 Act. Owing to the decision in *Rose* v. *Hurst* [1949] 2 K.B. 372, both the landlord and tenant usually agreed readily on a new lease; the landlord because he could get an increased rent, the tenant because if he wished to vacate the premises he could sell the goodwill with the benefit of the lease. Similarly if he died, his estate had a valuable asset. Now the tenant is confined to his remedies under the Rent Acts. There is no inducement upon the landlord to grant him a new lease and no compensation is payable if the landlord obtains possession with the benefit of the goodwill. As a statutory tenant the tenant will have no assignable rights to transfer with the goodwill. In practice those who are well advised will probably attempt to overcome this difficulty by the grant of separate leases of the residential and business part of the premises, a device which will usually be regarded as legitimate by the courts.

Miscellaneous Amendments

Part III makes minor modifications in favour of tenants of the right to claim compensation for improvements. Part IV contains miscellaneous amendments of landlord and tenant law. The Leasehold Property (Repairs) Act, 1938, now applies to houses of any rateable value if the lease was for seven years or longer and at least three remain unexpired (s. 51). The power to modify restrictive covenants affecting leaseholds is extended (s. 52). A county court can deal with all cases where the dispute is as to whether a landlord's consent is unreasonably withheld (s. 53). And there is a useful new power to get rid of tenancies where the tenant has disappeared (s. 54).

Conclusion

It is inevitable that the relationship of landlord and tenant should be the plaything of politicians and while this state of affairs continues, we must expect regular doses of legislation of this type. It is and will be designed to deal with grievances, real or imaginary, of the moment. But neither the method of rough and ready justice nor the method of elaborate intricacy seems adequate to avoid the creation of fresh anomalies and injustices. What is needed is a complete overhaul and consolidation of landlord and tenant legislation undertaken by an impartial committee impressed by the need to steer a course between these two methods and produce a system which will be both just and workable. But even if such a system were to be produced, it is doubtful whether Parliament could resist the temptation to reduce it to nonsense as it passed through the various stages of becoming law.

John Montgomerie.

NOTES OF CASES

Judicial Review for Error of Law
The Shape of Things to Come?

In *R.* v. *National Insurance Commissioner, ex p. Timmis* [1954] 3 All E.R. 292, it was held that a person detained as being of unsound mind and a person detained as a mental defective were undergoing "detention in legal custody" under section 29 (1) (*b*) of the National Insurance Act, 1946, and were therefore disqualified for receiving insurance benefits. The case is worth noting for a point which was left open and not fully argued: whether certiorari will issue to quash decisions of the National Insurance Commissioner which, according to section 43 (1) of the Act, "shall be final." This is not the place to set out at length the difficulties which surround the question of the extent to which an Act of Parliament by using certain words may exclude certiorari, but the consequences of a power in the courts to review the decisions of the Commissioner would be considerable. It can be accepted that the power to review for excess of jurisdiction in a limited sense, or for breach of the rules of natural justice would, in the unlikely event of cases arising, be proper. But there would be considerable confusion and difficulty if the courts gave a wide interpretation to the meaning of "jurisdictional facts." Yet this is small compared to the revolution in procedure that would follow if, as in this case, the court assumed the power of reviewing for error of law on the face of the record. It is essential to the working of the present procedure that the Commissioner should give reasons for his decisions. But if there is to be litigation in the courts on his interpretation, the result will be to introduce into the field of national insurance and, presumably, to reintroduce into the field of industrial injuries, the costly and dilatory procedure so notorious under the Workmen's Compensation Acts which the Acts of 1946 sought to end. Amending legislation would then become imperative, if the original intention of Parliament were to be preserved.

J. A. G. Griffith.

Duty of Occupiers Towards Children of Tender Years

Local authorities and other bodies which provide recreational facilities for children will be concerned to know in what respects, if any, their position has been affected by the recent decision of the Court of Appeal in *Bates* v. *Stone Parish Council* [1954] 1 W.L.R. 1249, the case of the boy who was blinded when he fell off a chute

in a playground and who claimed damages from the parish council responsible for the place. The decision contains no new principle, but it is submitted that it represents a heavy underlining of a rule to which little attention has been paid hitherto in the texts, but which has more than once been acted upon by the courts. This rule contains a limitation on the licence or permission extended to children to enter premises or land, to the effect that this licence may in certain circumstances be deemed not to extend to children of tender years unless they are in the care of a competent guardian. If such children are injured while on the land or premises, they may be precluded from recovering damages because they had no business to be there unaccompanied. This statement of the rule leaves undefined the particular circumstances in which this exception to liability applies. It also gives no guidance on when a child is to be considered so young as to fall into this category. Nevertheless, if this is accepted as a rule of law, it does represent a substantial limitation on the liability of occupiers to persons coming upon their land or premises.

In the particular circumstances of *Bates* v. *Stone Parish Council*, it was held that this rule did not apply, not because the child was too old, for the infant Bates was only three and a half years old, and it was clearly felt that he should not have been allowed out alone, but for the reason that the Council were held to have extended an open invitation to children of all ages and to have taken insufficient steps to exclude children of tender years. Moreover, they had failed to take adequate remedial action to correct a defect in their equipment which had become known to them through a previous accident. They were therefore held liable in damages, though the amount of the damages was reduced from £17,500 which the jury had assessed, to £9,000.

It is to be observed that in this case the child was permitted to go to the recreation ground with a child six years old, and fell from the platform of the chute or slide, which was twelve feet high. He had already made several descents with the other child, but on the occasion of the accident he went up to the platform alone and fell through a space some $13\frac{1}{2}$ inches square between the upright and horizontal rails on the side of the platform. Some thirteen years previously, in 1934, a boy of four had fallen from the platform when the rails had been in a similar condition, and additional rails had then been added as a measure of safety. In the interval these railings had either rusted or broken away and had not been replaced. At the trial the jury had found that the plaintiff was a licensee of the parish council, and that they had knowledge of the danger. Judgment was given in favour of the plaintiff. On the appeal the issue of liability and the amount of damages awarded were contested, and the Court of Appeal upheld the decision that there

was liability, although, as has been pointed out, the damages were substantially reduced.

In reaching this conclusion, the Court of Appeal accepted the appellants' contention that the law requires a competent person to accompany a very young child in certain circumstances, and that this may be regarded as a condition attached to the licence or permission to enter the land or premises. There was some authority for this in the statement of Lindley J. in *Burchell* v. *Hickisson* (1880) L.J.C.P. 101, at 102, where he said: " There could be no duty on the part of the defendant towards the plaintiff further than that the defendant must take care that no concealed danger exists. The plaintiff was, no doubt, too young to see or guard against any danger, but the logical way of considering the matter is to consider it alternatively in this way: the defendant never invited such a person as the plaintiff to come unless he was taken care of by being placed in charge of others, and if he was in charge of others then there was no concealed danger. In other words, there was no invitation to the plaintiff if he was not guarded, and if guarded, then there was no trap."

This statement was expressly adopted by Hamilton L.J. in *Latham* v. *R. Johnson & Nephew, Ltd.* [1913] 1 K.B. 398, at 414, and was followed by Farwell L.J. in the same case, at 407. Vaughan Williams L.J. decided *Schofield* v. *Mayor, etc., of Bolton* (1910) 26 T.L.R. 230, along the same lines and Farwell L.J. concurred. More recently, the case of *Coates* v. *Rawtenstall Borough Council* [1937] 3 All E.R. 602, shows that a child of three and a quarter may be regarded as a licensee not a trespasser where he is in the care of a lad of fourteen. *Bates'* case suggests that a child of six is too young to be a competent guardian.

All the cases mentioned in the last paragraph, insofar as they purport to follow *Burchell* v. *Hickisson*, ignore the fact that the rule about young children being treated as licensees only if accompanied by some competent person formed only one part of Lindley J.'s judgment, and was not referred to by the other judge, Lopes J., nor is it mentioned in the headnote of the report. The *ratio decidendi* was clearly that in the circumstances of that case there was no trap. It is not desired to throw doubt upon the rule itself, which appears to be quite sensible, but merely to indicate its antecedents, which appear to be the *obiter dicta* of Lindley J.*

The justification for the rule is well expressed by Somervell L.J. at p. 1253 of the report of the *Bates* case: " A wholly undue burden would be placed on the provision of facilities for the young, whether by local authorities, institutions or private individuals, if

* A case decided by Devlin J. and reported in *The Times* newspaper on December 4, 1954, under the name of *Phipps* v. *Rochester Corporation*, appears to be relevant to this question, but at the time of going to press it had not been published in any of the series of law reports, and it may be necessary to discuss it in a subsequent number of this *Review*.

they were held liable in damages because some of those facilities were a danger to very small unattended children."

Although, as Romer L.J. said, "No case was made out on the evidence to support a case of conditional licence to children such as the plaintiff" (p. 1262), it is now clear that "if the circumstances reasonably permit of it, the court would assume that, so far as infants were concerned the licence to enter is conditional upon their being accompanied by a competent guardian" (p. 1261).

The "fly in the ointment," from the point of view of the parish council, was the fact that they had not laid down any restriction on their invitation to the playground and that, even after the accident of 1934, "their policy was to admit all children whether young and unattended or not" (Somervell L.J. at p. 1253). They had, it is true, taken steps to cover up the hole in the railing, but there was no adequate protection at the time of the accident. Moreover, the present council were regarded as having knowledge, actual or implied, of the accident of 1934 and the danger which it revealed. It was on account of this knowledge or presumed knowledge of the dangerous state of the equipment that they were held liable. In the light of these facts, it would have been remarkable if the result had been otherwise. The council were insured up to £5,000, but have been forced to apply for a loan to meet the balance of the award of £9,000 damages. This will undoubtedly involve a heavy burden for the ratepayers of Stone (there are some 8,000 inhabitants in the parish, according to *The Times*, July 30, 1954).

The moral for other authorities who wish to avoid such a liability falling on them is surely (1) to realise what a high duty rests upon them in relation to recreational facilities provided for children, and take adequate steps to keep their equipment in a safe condition, (2) to consider the advisability of taking special steps to exclude very young children unless they are accompanied by some competent person, (3) to take care to insure to an amount sufficient to cover any reasonable claim for damages, remembering that £5,000 nowadays is hardly sufficient.

J. E. Hall Williams.

Negligent Misstatement—More Judicial Caution—Candler *v.* Crane, Christmas & Co. in South Africa

In *Herschel* v. *Mrupe* [1954] (3) S.A. 464 the South African Appellate Division considered a problem in the law of negligent misstatement. The plaintiff wished to claim damages for the death of her husband in a road accident, caused by the negligent driving of a vehicle owned by the defendant. The Motor Vehicle Insurance Act, 1942, compels a person in the plaintiff's position to sue the insurer of the vehicle in the first instance, and section 22 of the

Act compels the owner to produce on request the " declaration of insurance " covering the vehicle involved in the accident.

Instead of making a request under the Act the plaintiff's attorney wrote informally to the defendant's attorney asking the name of her insurance company. The defendant who owned a number of vehicles insured with different companies honestly but mistakenly replied through her attorney that the South British Insurance Co. were the insurers. If the declaration of insurance had been inspected the mistake would have been revealed.

The plaintiff then wasted costs in fruitless negotiations with the South British Insurance Co., and in bringing an action against it which she was obliged to discontinue when the defence was delivered and she discovered her mistake. She then sued the defendant for damages for wasted costs caused by the negligent misstatement. Having won originally in the magistrate's court she pursued the case to the Appellate Division only to find judgment go against her by a majority of four to one.

In the end it was unnecessary to decide whether the plaintiff was guilty of contributory negligence, and judgments turn on whether the defendant was negligent. In Roman-Dutch law Aquilian liability may be established by showing that the defendant's negligence caused patrimonial loss to the plaintiff by infringing his rights. This does not, of course, eliminate the problem of the duty of care, because negligence presupposes a duty. Of the majority judges in *Herschel* v. *Mrupe* Fagan J.A. decided that it had not been shown that the defendant had no reasonable ground for answering as she did; Schreiner and Hoexter JJ.A. that she had no duty to take care that her answer was correct; Van den Heever J.A., paradoxically, that she had such a duty but had infringed no right of the plaintiff. Centlivres C.J., in his dissent, held that a duty existed, and made an approving reference to Denning L.J.'s judgment in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.

The connoisseur may be left to extract the *ratio decidendi* of the case. What is common to the majority judgments is the view that the law should be cautious in imposing liability for negligent misstatements. In *Perlman* v. *Zoutendyk* [1934] C.P.D. 151 it was held that a sworn appraiser would be liable, apart from contract, to a mortgagee who advanced money on the faith of his negligent valuation. In that case Watermeyer J. said that whether the defendant owed a duty of care depended on " whether as a reasonable man he should have foreseen the likelihood of harm being caused to someone in the position of the plaintiff." Since the appraiser knew or ought to have known that his certificate would be used to raise money he had a duty to be careful.

The present case makes it clear that though the decision in *Perlman* v. *Zoutendyk* can still be supported on the ground that

a sworn appraiser, like a notary, exercises a public function, Watermeyer J.'s statement, if taken without qualification, is too wide for Roman-Dutch as it certainly is for English law.

In the first place, it is not true that whenever harm is likely to be caused by careless conduct there is a duty to be careful. The likely harm may be too insignificant to impel a reasonably prudent man to take precautions, as when, in *Wasserman* v. *Union Government* [1934] A.D. 228, the deceased was stung by a bee, a swarm having hived in defendant's police station. In *Herschel's* case the only harm to be expected from naming the wrong insurance company was a small amount of time and expense lost in writing a letter to the company.

In the second place, social utility may deter the courts from imposing a duty even when considerable harm is likely, as it will often be when, say, a newspaper gives wrong information. One limitation suggested by *Herschel's* case is that no duty will exist unless the information sought is peculiarly within the knowledge of the party giving it (Centlivres C.J. at p. 472), and cannot be tested for accuracy by the party seeking it (Van den Heever J.A. at p. 491). Consequently, a private citizen has in general no right to demand that another private citizen of whom he asks the time or the way to the station should take care in answering, however much the inquirer may insist on the importance to him of the answer being correct (Schreiner J.A. at p. 479; the whole judgment is instructive).

If the defendant is a professional man the case suggests that, unless his office is public or semi-public, he will not owe a duty of care in making a statement, apart from contract and statute, even if he knows that the person to whom he is making it intends to act on it and will suffer harm if it is wrong. The point is not actually decided in *Herschel's* case, since the negligence alleged was the defendant's own misstatement, not her attorney's failure to consult the declaration of insurance before replying. The majority judgments, however, indicate that a South African court would probably reach the same conclusion on the facts of *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164 as the majority of the English Court of Appeal.

This need cause no regrets, for while it may be desirable to make a party to a contract liable for a negligent misstatement made in carrying it out, as was done in South Africa in *Western Alarm System* v. *Coini* [1944] C.P.D. 271, to make professional men responsible to ordinary members of the public for their misstatements would either reduce them to silence or turn them into public servants.

A. M. Honoré.

English Contracts and American Anti-Trust Law
The Nylon Patent Case

The decision of Danckwerts J. in *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.* [1954] 3 W.L.R. 505, is of some interest as a contribution to the English system of the conflict of laws in relation to contracts. It is of far greater significance as an incident in the great battle which has now been raging for a decade about the international application of the Sherman Anti-Trust Act of 1890, and as such it touches fundamental issues of international law and international relations. In reviewing the case it is necessary also to refer to the previous decision of the Court of Appeal in *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.* [1953] Ch. 19, which dealt with a motion for an interlocutory injunction but in which all the really important issues were already discussed.

In 1944 the United States Department of Justice began to take proceedings under the Sherman Anti-Trust Act against a number of corporations engaged in the production of chemicals, including Imperial Chemical Industries, Ltd. ("I.C.I."), an English company, and E. I. du Pont de Nemours, Inc. ("du Pont"), an American corporation. They were alleged to have entered into contracts and engaged in combinations and conspiracies "in restraint of trade or commerce among the several states or with foreign nations," and also to have monopolised or attempted to monopolise or combined or conspired with others to monopolise part of such trade, *i.e.*, to have committed criminal offences under sections 1 and 2 of the Sherman Act. The United States Government did not, however, prosecute these corporations but started "proceedings in equity" under section 4. It sought to obtain restrictive and mandatory injunctions to "prevent and restrain" violations of the Act, *i.e.*, it availed itself of what is in fact an administrative procedure entrusted to the Federal Courts and one of the several methods through which the Government may seek to enforce the standards of public law and the economic policies enshrined in Anti-Trust law. I.C.I. and du Pont had for years been parties to far-reaching agreements for the allocation of markets, some of which (including the United States) were reserved to du Pont, while others (including the British Commonwealth outside North America) were reserved to I.C.I., and still others (including Canada) shared by both, partly through jointly owned subsidiaries. In 1951 and 1952 Judge Sylvester Ryan in the Federal District Court for the Southern District of New York, made a number of orders designed to terminate these agreements and the allocation of markets between the two corporations, and to compel them to "divest" themselves of their joint interests. In 1939 I.C.I. had obtained from du Pont exclusive licences to exercise and practise in the United Kingdom and certain other parts of the

Commonwealth all inventions concerning the manufacture of nylon for which du Pont had taken out United Kingdom and other Commonwealth patents, and by a further agreement of 1946 (by which the earlier one of 1939 was cancelled) I.C.I. acquired these patents from du Pont. It was one of the terms of Judge Ryan's decrees that the 1946 agreement should be cancelled within ninety days and the patents be reassigned to du Pont. Moreover, both corporations were ordered not to make any disposition of non-American patents, without granting until 1977, "to the extent they have the legal right to do so," non-exclusive immunities "to import into any foreign country any common chemical product lawfully manufactured in the United States."

In 1940 I.C.I., acting in virtue of the patent licences obtained from du Pont in 1939, granted exclusive sublicences (for the United Kingdom and other parts of the Commonwealth) to British Nylon Spinners, Ltd. ("Nylon"), a subsidiary company of I.C.I. itself and of Courtaulds, Ltd., each of these two parent companies having half the share capital and an equal share with the other in the control of the subsidiary. In 1947, after it had acquired the patents, I.C.I. made an informal agreement with Nylon by which the latter were given the right to be granted licences instead of sublicences, although the licences were never formally executed. Nylon continued to manufacture the patented products with the consent of I.C.I.

If I.C.I. complied with the decrees made by Judge Ryan, they rendered impossible the performance of their licence agreement with Nylon, *i.e.*, they broke their contract. If, on the other hand, they continued to perform the agreement, they violated the decrees and possibly laid themselves open to contempt proceedings in the Federal Courts. By reassigning the patents to du Pont, I.C.I. would put it out of their power to grant the licences to Nylon. On the other hand the grant of these exclusive licences for manufacture of nylon in the United Kingdom was prohibited by Judge Ryan's decree, unless the licensee agreed to hold the licence subject "to the rights of American manufacturers of these nylon products freely to import and vend in the United Kingdom articles manufactured in accordance with patents or with comparable patents" (*per* Evershed M.R. [1952] 2 All E.R. at p. 781).

British Nylon Spinners, Ltd. at first sought and obtained from Upjohn J. an interlocutory injunction restraining I.C.I. from assigning to du Pont any patent rights acquired under the 1946 agreement. This decision was affirmed by the Court of Appeal. In the instant case they sought and obtained from Danckwerts J. a declaration that they were entitled to be granted exclusive licences, an order for the specific performance of the 1947 agreement, a permanent injunction restraining I.C.I. from parting with the patents, and the rectification of the register of patents.

At first sight the case looks unproblematical. The licensing agreement between I.C.I. and Nylon was a contract made in England between two English companies carrying on business here, referring mainly to United Kingdom patents, and to be performed in England, *i.e.*, it was clearly an English contract. Danckwerts J. (at p. 518) had no hesitation in saying that English law was the proper law of the entire contract, and the Master of the Rolls emphasised (at p. 26) that Nylon's right, *i.e.*, the right which related to all the patents, whether granted in the United Kingdom or elsewhere in the Commonwealth, was a right under "an English contract made between English nationals and to be performed in England." It was an English contract which mainly, though not entirely, concerned a "species of English property," *viz.*, United Kingdom patents, choses in action "situated" here. How could American law, how could an American judgment applying American law possibly vary the rights and obligations created by an English contract to be performed outside the United States? There was nothing, from the point of view of the conflict of laws, to connect the licensing agreement between the parties with the United States. The proposition that American law should be able to compel an English company in England to break its English contract with another English company is plainly absurd. It was rejected many years ago by the Privy Council in *Trinidad Shipping Co.* v. *Alston* [1920] A.C. 888, where an English company which had branch offices in Trinidad and in New York pleaded in vain that, by making a promised payment in Trinidad under a contract governed by the law of that colony, it would expose itself to penalties in the United States under the Anti-Trust Law. The fact that the property rights which were the subject-matter of the contract were mainly situated in England—a fact much emphasised by the Master of the Rolls (at p. 26)—was not, it is submitted, decisive. Further, the interpretation (at pp. 519 *et seq.*) by Danckwerts J. of the American judgments to the effect that compliance with an English judgment would not be treated as contempt of the American court is very interesting but not, it is suggested, relevant to the result. If an attempt had been or was being made to visit the English company with the penalties of contempt of court for having performed its obligation under the English contract or for having complied with the English judgment, weighty issues would be raised from the point of view of public international law, but from the point of view of the conflict of laws the matter would hardly seem to be relevant. What matters is that this was an English contract to be performed in England. English courts have, in the past, sought to compel foreign nationals to do something which was contrary to the law of the country to which they belonged and in which they resided. Thus in *Kleinwort, Sone & Co.* v. *Ungarische Baumwolle Industrie Akt. Ges.* [1939] 2 K.B. 678, the Hungarian defendants who carried

on business in Hungary were ordered to make a payment to the plaintiffs in London although by doing so they would act contrary to Hungarian currency legislation, but the contract was an English contract and the place of performance was in London, and where, as in *De Beéche* v. *South American Stores, Ltd.* [1935] A.C. 148, the contract is subject to a foreign law, the English courts will not compel either party to do anything contrary to that law.

The only substantial difficulty was created by the rule of English domestic law that a contract is illegal and void if it constitutes an act of defiance directed against the law of a friendly country, a rule of which *Foster* v. *Driscoll* [1929] 1 K.B. 470, the whisky smuggling case, is the classical example. The importance of the case under review and of the previous judgment of the Court of Appeal must be found in the clear decision that, for this domestic English rule of public policy to operate, there must be a *deliberate* act of defiance, and this must be *ab initio*. "There is no evidence before me," said Danckwerts J. (at p. 519), "that the object of the contract of March 5, 1947, was to do anything contrary to the law of the United States and no evidence that the plaintiff company (*i.e.*, Nylon) was party to or had any knowledge of any conspiracy contrary to the law of the United States when that contract was entered into." (Neither Nylon nor Courtaulds, Ltd. were, of course, parties to the American proceedings.) This point does not seem to have been decided before, and the present case appears to lend judicial support to a submission made in the current edition of Dicey's *Conflict of Laws* (6th ed., p. 607) that "the mere fact . . . that a contract not made with the object of defying the laws of a foreign country, involves the doing of something prohibited by its laws, will not . . . invalidate the contract, unless the prohibition forms part of the proper law or—possibly—of the *lex loci solutionis*."

So much for the contractual aspect of the case. Its far deeper significance lies in the question whether the judgment of the Federal District Court does not constitute a violation of public international law and whether for that reason alone it should not be regarded as incapable of having any effect outside the United States. This problem, only touched upon in the Court of Appeal and only faintly indicated by Danckwerts J., cannot be adequately discussed here. "The first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State" (Majority Opinion of the Permanent Court of International Justice in the *Case of the S.S. Lotus*, Series A, No. 10, p. 18). Undoubtedly, as the Master of the Rolls said (at p. 24), this case "raised a somewhat serious question whether the order (of the American court), in the form it takes, does not assert an extraterritorial jurisdiction which the courts of this

country cannot recognise." Did it not raise the more fundamental question to what extent it is compatible with international law for the United States to impose the economic policies of its Anti-Trust law upon markets and territories outside the United States? The American judge had, of course, been aware of this problem which has been discussed in the United States for a long time, but he pointed out that it was "not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States." The Master of the Rolls expressed (at p. 25) his disagreement with this. "If by that passage the learned judge intended to say (as it seems to me that he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign or to its courts or to nationals of that foreign power, effectively to remove (as he said) 'harmful effects on the trade of the United States,' I am bound to say that, as at present advised, I find myself unable to agree with it."

The jurisdiction of the Federal Courts under the Anti-Trust laws is a penal jurisdiction, no matter whether it is exercised in criminal or in equitable proceedings. It was held by the Supreme Court and emphasised by Mr. Justice Holmes in *American Banana Co.* v. *United Fruit Co.* (1909) 213 U.S. 347, at p. 356 that, whatever form it takes, this jurisdiction cannot be exercised beyond the limits set to criminal prosecutions by international law, *i.e.*, that it cannot be exercised against non-Americans with regard to acts done outside the United States. This does not seem to have been doubted in America, but a novel interpretation has been given in a number of recent American decisions to the concept of *locus delicti*. This new conception that anything which "affects" or "concerns" American trade is deemed to have been done inside the United States is reflected in the judgment of Judge Ryan which is subject to the limitation that "in their application to I.C.I. . . . the provisions of this judgment are intended to relate exclusively to acts, agreements, arrangements or understandings which concern the foreign or domestic commerce of the United States." An agreement may of course "concern" the commerce of the United States without having anything to do with the import of goods into or the export of goods from the United States: the court did not intend to nor did it, through this limitation, restrict the effect of the judgment to the domestic or foreign market of the United States itself. Any allocation of markets, such as the reservation of the United Kingdom for I.C.I. "concerned" the commerce of the United States inasmuch as it prevented actual or potential American exporters from sharing the market in the United Kingdom. The question arises whether there can be any such thing as "acts, agreements, arrangements or understandings" with reference to major commodities that do not somehow "concern the foreign or

domestic market of the United States," *i.e.*, whether any significance attaches to the limitation placed by Judge Ryan upon his judgment and whether the redefinition of *locus delicti* in the more recent cases on the international application of Anti-Trust law does not amount to the claim that this law should be a world law of practically unrestricted international application. Whether this new conception has become part of American law is not clear, but even if it has, it certainly has not become part of international law. The assertion of this jurisdiction cannot be justified from the international point of view, and, for that reason alone, it is submitted, the American judgment should in the instant case have been regarded as invalid so far as it purported to regulate the conduct of an English company outside the United States.

O. Kahn-Freund.

Divorce on the Ground of Incurable Insanity—Detention in Pursuance of an "Order"—"Continuous" Care and Treatment

The provisions in the Matrimonial Causes Act, 1950, s. 1 (1) (*d*) and (2), for the dissolution of a marriage by reason of either spouse's incurable unsoundness of mind have often been criticised as being unduly narrow, *i.e.*, as too hard on the spouse of a patient suffering from an incurable mental disease, and possibly also on the children of such a marriage. This is one of the most delicate legislative problems in family law. While the present law makes it too difficult to dissolve a marriage of this kind, it must not, on the other hand, be made too easy, *i.e.*, the interests of the mental patient, especially if there is any chance of a recovery, require to be considered as carefully as those of his or her spouse. What appears to be mainly objectionable in the present law is its formalistic character, especially the need for the patient having been "continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition," and that for an order for the detention of the patient in the first place, *i.e.*, that he must have been a "certified" patient (or in a similar position) at one time, and that no period of voluntary sojourn in a mental hospital counts against the five-year period unless it was preceded by a period during which the patient was there under an order for his detention or similar measure (section 1 (2) (*d*)). It is gratifying to see that in both directions, *i.e.*, with regard to the need for an "order for detention" in the first place and to that for "continuity" of mental treatment the courts appear to be doing their best towards softening the rigidity of the law, although this cannot make up for the lack of the discretion which the courts ought to but do not have in adjusting the interests of the mental patient and those of the other spouse.

In *Chapman* v. *Chapman* [1954] 3 All E.R. 116, and in *Bithell* v. *Bithell* [1954] 3 W.L.R. 463, it was held that an "urgency order" under section 11 of the Lunacy Act, 1890 (which remains in force for only a week) and a statement by two members of a "visiting committee" being the basis of temporary detention under section 5 of the Mental Treatment Act, 1930, were orders for the detention of the patient satisfying the requirements of the Matrimonial Causes Act. The second case, *Bithell* v. *Bithell*, involved a highly technical analysis by Lord Merriman P. of the exceedingly complex provisions of lunacy law, but from the point of view of divorce law both cases may perhaps be epitomised as laying down the proposition that a temporary measure for the detention of a patient, if followed by voluntary sojourn at the mental hospital, constitutes a compliance with the requirements of the statute.

Even more important is the decision of the Court of Appeal in *Swymer* v. *Swymer* [1954] 3 W.L.R. 803. There the husband had been a mental in-patient continuously from 1925 until the presentation of the petition in October, 1953, except that from January 10 to May 11, 1953, he had been at an ordinary hospital for treatment of a fractured leg, but his name remained on the books of the mental hospital and the medical superintendent of the mental hospital received regular reports about the patient during this period. At that time he was, and ever since December, 1951, he had been, a voluntary patient. The stay at the general hospital was held by the Court of Appeal not to have interrupted the continuity of the "care and treatment" within the meaning of the Matrimonial Causes Act. The temporary absence of a voluntary patient in circumstances such as these did not break the continuity of the treatment any more than the leave or holiday granted as part of his treatment to a certified patient.

The cases reviewed in this note are of a somewhat special character, but they have been discussed here as instances of a judicial tendency to give to a rigid provision an interpretation in accordance with the social needs it was intended to serve.

O. KAHN-FREUND.

LEGITIMACY OF A CHILD—CONFLICT OF PRESUMPTIONS

A CHILD borne by a married woman is rebuttably presumed to be the child of her husband. A child born within nine months (or perhaps better, within a reasonably possible period of gestation) from the termination of a marriage is rebuttably presumed to be the child of the mother's former husband. Which presumption prevails if, within nine months of the termination of her marriage by the husband's death or by divorce, the wife remarries, and then, still within nine months from the termination of the first marriage,

gives birth to a child? Is the child presumed to be the offspring of the first or of the second husband?

In *Re Overbury, Sheppard* v. *Matthews and Others* [1954] 3 W.L.R. 644, the mother of the intestate (the succession to whose estate was in dispute) married Rawlings on July 4, 1868. Rawlings died on January 25, 1869. On July 27, 1869, she married Sheppard. The *de cujus* was born on September 24, 1869, *i.e.*, well within nine months of Rawlings' death. Her birth certificate showed that she was named "Matilda Rawlings" (these being her Christian names), the father was described as "John William Sheppard." She called herself "Minnie Matilda Sheppard" until her marriage in 1901, and in her marriage certificate she was described as Sheppard's daughter. All this seemed strongly to point to a presumption that she was Sheppard's daughter. Yet, as Harman J. had no difficulty in showing, the application of this presumption in the particular circumstances would have been absurd: it would have implied that, as a young woman, the intestate's mother had, within the first six months of her marriage, ceased to cohabit with her husband, and committed adultery with the man who afterwards became her second husband. The first husband had been killed in an accident, and everything pointed to the fact that Sheppard had married the young widow and consented to treat the first husband's posthumous child as his own. The maternal relations of the *de cujus* tried to argue that the two presumptions, as it were, cancelled each other out; that, therefore, the *de cujus* was the legitimate child of her mother, but not that of an ascertainable father, an argument which had only to be stated to be rejected. The actual point before the learned judge does not seem to have arisen before, and all there was by way of judicial authority was a dictum of Cohen J. (as he then was) in *Re Heath* [1945] Ch. 417, at p. 422, according to which, in a situation of this kind, the presumption of legitimacy would make the child the legitimate offspring of two fathers, a dictum from which Harman J. (rightly, it is respectfully submitted) dissociated himself.

Although, however, the precise issue, *i.e.*, the birth of the child within nine months of the first husband's death but after the mother's remarriage, had not arisen before, *Maturin* v. *Att.-Gen.* [1938] 2 All E.R. 214, shows the same basic problem in a different setting. There the child's mother, having in March, 1929, petitioned for divorce (without having filed a discretion statement), lived in April and May, 1929, apart from her husband, and constantly saw the man whom she was to marry later. She obtained a decree *nisi* in June, 1929, and a decree absolute on January 13, 1930. The child was born ten days later, and the mother remarried in March. Hodson J. (as he then was) held that the child had been legitimated by the subsequent marriage of her parents, *i.e.*, that the presumption of legitimate descent from the man who as late as ten days

before the birth of the child had still been the mother's husband was rebutted by the facts. There was not in this case, of course, a conflict between two presumptions (there being no presumption of legitimation by subsequent marriage), but it cannot be doubted that Hodson J. would have decided the case in favour of descent from the second husband even if the marriage between him and the mother had occurred before and not after the birth of the child.

The contrast between the *Overbury* and the *Maturin* situations illustrates the uncertainty which can be caused by the absence of a rule such as that in Article 103 of the Swiss Civil Code of 1907. This is to the effect that a widow and a woman whose marriage has been dissolved or annulled may not marry again before the lapse of 300 days from the death of the husband or the dissolution or annulment of the former marriage, but that the " waiting period " ends as soon as a child is born. The court may shorten the waiting period if it is impossible that the woman is pregnant by the former husband, and also if spouses whose marriage has been dissolved decide to remarry. Violation of these provisions does not affect the validity of the new marriage (Article 130), it is merely an *impedimentum impediens*, preventing the relevant officer from celebrating the marriage. Similar provisions, designed to prevent *turbatio sanguinis* can be found in Article 228 of the French Civil Code and in many other Continental Codes. The case under review appears to show that there may be need for a similar provision in this country, a need accentuated by the abrogation of the rule in *Russell* v. *Russell* [1924] A.C. 687 (Matrimonial Causes Act, 1950, s. 32). Uncertainty of the law in matters of legitimacy should, it is submitted, be avoided at all cost.

O. KAHN-FREUND.

CONFLICT BETWEEN STATUTORY AND CUSTOMARY LAW OF MARRIAGE IN NIGERIA

THE Privy Council case of *Bamgbose* v. *Daniel* [1954] 3 W.L.R. 561 illustrates what is sometimes called an " internal " or " interpersonal " conflict of laws. That is to say, it involved a choice, not between the laws of two different countries (or even of different parts of the same country), but between two different laws co-existing in the same area of jurisdiction, *viz.* (1) the general law of Nigeria, and (2) a particular law, consisting of the " native law and custom " of that section of the population of Nigeria to which the parties belonged. This kind of legal dualism is, of course, characteristic of most African territories at the present time.

The issue was one of legitimacy. The appellant had challenged the right of his twelve cousins (respondents in this appeal) to succeed to the estate of their father, who had died intestate. He contended that, as they were the offspring of polygamous marriages contracted by the deceased under native law and custom, they did

not rank as legitimate descendants for the purpose of succession. In point of fact (so ran the appellant's claim) he himself was the nearest legitimate kinsman of the deceased. Now if the law applicable to the distribution of the estate had been native law and custom, there could hardly have been any question as to the legitimacy of the respondents. Actually, however, the distribution of the estate was governed by non-native law. This was the result, not of any act on the part of the deceased himself, but of the fact that *his* parents (*i.e.*, the grandparents of both appellant and respondents) had contracted a marriage under the Marriage Ordinance, 1884, of the Colony of Lagos—that is, in effect, a monogamous marriage according to the general law of Nigeria.

What is the legal effect of such a marriage between a man and a woman who have hitherto been subject to native law and custom? Does it involve, wholly or in part, the renunciation of native law and custom and the assumption of a new legal status—*i.e.*, the status of a person who is governed by the general law? If so (and this is the important question for the present purpose), does it involve the automatic transmission of that status to their descendants? The ramifications of these questions were not, of course, fully explored in the present case; two aspects of the matter were, however, expressly dealt with. First, as regards property: section 41 of the Marriage Ordinance, 1884, provided that the English law of intestate succession should, notwithstanding any native law or custom to the contrary, apply (within certain limits) to the property of persons married under that Ordinance—and not to theirs only, but to that of their issue. It was thus that the Statute of Distribution, 1670, came to be invoked in the present case.

So far the Ordinance seems to evince an intention to place both the spouses and their offspring outside the sphere of native law and custom. But the position is different when we examine the effect of the Ordinance in relation to the second point: capacity to marry. Marriage according to the general law necessarily involved acceptance by the spouses of the obligation of monogamy —but only, it seems, for the duration of the marriage in question. This is apparently implied in section 37 of the Ordinance cited, which precludes a person who is a party to a statutory marriage from contracting, *during the continuance of such statutory marriage*, a valid marriage according to native law and custom. *A fortiori*, the mere fact that a person was the child of a statutory marriage would be no impediment to his contracting a marriage—or, it seems, a succession of polygamous marriages—according to native law and custom. In the words of the Privy Council judgment, delivered by Lord Keith of Avonholm:

> "Their Lordships would observe that no question can arise as to the capacity of the deceased to enter into polygamous marriage by his local law. He himself was the child of a

monogamous marriage, but that was no impediment to his contracting a marriage by native law and custom" (p. 267).

It followed that the respondents, as the offspring of the polygamous marriages contracted by the deceased, were his legitimate children according to the law governing those marriages, *i.e.*, native law and custom. This meant—in view of the recognition accorded to native law and custom by the law of Nigeria—that they were legitimate by the law of their domicile (*viz.*, Nigeria). The final stage in the argument is reached thus:

> "Their Lordships entertain little doubt that, under what are now well accepted principles recognised by the English courts, no ground exists, in circumstances like the present, for excluding the respondents from taking their rights of succession if they are legitimate children of the deceased under the law of their domicile. . . .
>
> "In the present case, the Statute of Distribution is a statute applying to a limited class of persons domiciled in Nigeria. As a matter of construction and on the authorities referred to, it cannot, in their Lordships' opinion, be limited in its local application to children who are the issue of monogamous unions" (pp. 267–8).

The decision of the West African Court of Appeal in favour of the respondents was accordingly upheld.

To sum up: (1) The Privy Council based itself on the proposition (the correctness of which as a universal proposition may be open to question, but which was clearly innocuous in this case) that for purposes of the Statute of Distribution the legitimacy of a person claiming rights of succession was to be decided in accordance with the law of his domicile. (2) The law of the respondents' domicile in this case was the law of Nigeria; but the matter was not concluded by reference to the law of Nigeria *simpliciter*, inasmuch as that law itself was affected by a dualism which necessitated a choice between (a) the general law, which prescribed monogamy, and (b) an alternative personal law (*i.e.*, native law and custom) which allowed polygamy. (3) The recognition accorded to native law and custom was subject to certain conditions regarding the classes of persons to whom it was applicable; and the central question in the present case was whether the respondents' father was a person who, in respect of capacity to marry, came within the sphere of operation of native law and custom. (4) Notwithstanding the fact that he himself was the child of a statutory (as distinct from a customary) marriage, the respondents' father was not debarred from contracting valid polygamous marriages and begetting thereby legitimate children according to native law and custom. In other words, the statutory marriage of his parents had not had the effect of conferring on him the indelible status of a person governed exclusively by the general law. Like his parents, he had an *option de juridiction* (to use the convenient French

term): whereas they were free to renounce their original personal law, he was free to revert to it.

The possession and retention of such an *option de juridiction* seems to be a feature which differentiates the legal status of Africans (at any rate of local Africans) from that of other persons resident in Nigeria. Moreover, since native law and custom does not appear to be in a full sense a territorial law, it is presumably not open to a non-African to put himself, by a change of domicile, in a position to adopt as his personal law the native law and custom of the African local inhabitants.[1]

ARTHUR PHILLIPS.

"THE AGED, IMPOTENT AND POOR"

IN *Re Lewis, Public Trustee* v. *Allen* [1954] 3 W.L.R. 610, the question arose once again whether the words "aged, impotent [2] and poor" in the preamble to the Statute of Elizabeth I on Charitable Uses should be read disjunctively or conjunctively. The bequest in this case was of £100 each to ten blind girls and ten blind boys, "Tottenham residents if possible," and Roxburgh J. found that there was nothing in the will to import any element of poverty. Nonetheless he held this to be a good charitable bequest following *Re Fraser* (1883) 22 Ch.D. 827, where a gift for the blind in Inverness-shire was similarly held charitable.

Taken together with the well-established rule that poverty alone is sufficient to make a gift charitable, and with *Re Glyn* [1950] W.N. 373, and *Re Robinson* [1951] Ch. 198, which hold that age alone is also sufficient, this decision thus takes a further step in establishing that there are three separate types of charity under this head: (1) Trusts for the relief of poverty, (2) Trusts for the relief of the aged, and (3) Trusts for the relief of the impotent.

Yet despite this accumulation of authority in support of this view it cannot be regarded as satisfactory. The argument in favour of it rests on the admitted fact that poverty *per se* without any element of age or impotence is a good charitable object. Therefore, it is said, age must equally be a good charitable object without any element of poverty or impotence, and likewise impotence must be a good charitable object without any element of age or poverty. This may be strictly logical, but one would have thought that sufficient warning had now been given against pursuing strict logic, or attempting to argue by analogy in this branch of the law (see in particular Lord Simonds in *Gilmour* v. *Coats* [1949] A.C. 426). It is especially dangerous to argue by analogy from the poverty

[1] Could it perhaps be said that this principle provides the correct explanation of the case *Re Bethell* (1887) 38 Ch.D. 220?—O. K.-F.

[2] Impotent presumably means handicapped or incapacitated in some way or other.

cases to those of age or impotence for the former are anomalous in many respects and are governed by their own rules. For one thing the requirement of public benefit is always to some extent met in poverty cases inasmuch as the relief of poverty may itself be regarded as beneficial to the community (see *per* Lord Greene M.R. in *Re Compton* [1945] Ch. 123 at 139). Can this conceivably apply to the relief of the impotent or aged who may be in no need of any pecuniary assistance whatever? Yet if these are themselves good charitable objects a gift for an aged or impotent class of the public may be charitable without really satisfying what Lord Simonds called " the overriding question: Is it *pro bono publico?* " (*National Anti-Vivisection Society* v. *I. R. C.* [1948] A.C. 31). It is submitted that while it may be a good charitable object for impotence such as blindness to be relieved in some ways (*e.g.*, by the provision of books in braille), it scarcely seems to accord with the spirit of the statute that the blind rich should be " relieved " by money grants, as in the present case, or that the aged rich should be similarly " relieved " as in *Re Robinson*. Indeed, one may well ask, is this relief at all?

In point of fact, despite his decision upholding the gift Roxburgh J.'s judgment lends some support to the more practical and less logical approach since he regarded the question as different from that which arose in *Re Glyn* and *Re Robinson* –in other words he did not accept the disjunctive reading of the clause as decisive. In the last resort, however, he merely followed *Re Fraser*. Unfortunately, *Re Fraser* is not reported on this question and there is nothing to indicate whether or not the point had been argued.

This case is, therefore, likely to add fuel to Mr. Megarry's criticism of *Re Bradbury* [1950] W.N. 558, and *Re Robinson* (see 67 L.Q.R. 164). Mr. Megarry was there prompted to ask whether a trust for the benefit of " aged peers " or " impotent millionaires " would be charitable, adding that any possible argument that peers and millionaires are not sufficiently numerous to constitute a section of the public could be met by adding baronets and knights on the one hand and surtax payers on the other. Such a trust would presumably have to be upheld as charitable on the reasoning in *Re Robinson*, yet only in a strictly technical sense could the requirement of public benefit be said to be satisfied.

It is not surprising therefore that Russell J. in *Re Lucas* [1922] 2 Ch. 52, was " not satisfied that the requirement of old age would of itself be sufficient to constitute the gift a good charitable bequest," nor that Vaisey J. in *Re Bradbury* was " rather surprised " at the decision in *Re Glyn*, nor that Roxburgh J. should now in *Re Lewis* " well understand " Russell J.'s hesitations in *Re Lucas*.

Despite these expressions of opinion the gifts in all these cases were upheld as charitable, a result which can only be explained

on the ground that—as Vaisey J. said in *Re Bradbury*—where a case is near the line "there must be a certain bias in the mind of the court in favour of doing what the testator or testatrix obviously wanted to be done." It is submitted that this bias has led the courts astray on several occasions of which the present is another example.

P. S. Atiyah.

Modern Application of the Statutes of Mortmain

Morelle, Ltd. v. *Waterworth* [1954] 3 W.L.R. 257 evoked from the Court of Appeal a consideration of the policy and language of the Mortmain and Charitable Uses Act, 1888, in relation to the assignment of the residue of leases originally granted for less than 100 years. In this case the plaintiffs, Morelle, Ltd., were an overseas company registered in Eire which had acquired the residue of the lease of a house in south-east England, the original term having been granted for ninety-nine years and the residue having about nineteen years to run. The company had not established any place of business in England and it had not complied with the provisions of sections 407 and 408 of the Companies Act, 1948, concerning the delivery of particulars by overseas companies to the Registrar of Companies. The company claimed possession of the house from its tenant whose defence was that the company had forfeited the residue of the term to the Crown because of its failure to obtain a licence to hold the house in mortmain. The company's contention was that no licence was necessary since the assignment was of too short a period to attract the operation of the Mortmain and Charitable Uses Act, 1888. The company relied in particular on *Truro Corporation* v. *Rowe* [1901] 2 K.B. 870, *per* Wills J., at p. 875: "The statutes of Mortmain appear to me to have nothing to do with a short lease of fourteen years. It does not seem to me to be open to the class of objections which gave rise to the statutes of Mortmain; and I find that both Shelford (*Law of Mortmain*, ed. 1836, p. 9) and Tudor (*Charitable Trusts*, 3rd ed., 1889, p. 382) treat this as clear law." The Court of Appeal, however, considered that the Mortmain and Charitable Uses Act, 1888, had made a change in this respect since section 1 (1) of the Act prohibited the assurance of land for the benefit of a corporation otherwise than under the licence of Her Majesty, and section 2 empowered Her Majesty to grant licences in mortmain *in perpetuity or otherwise*. Further, since by section 10 assurance included a lease and land included tenements and hereditaments of any tenure it was clear that a lease of land to a corporation for any period, however short, was an assurance in mortmain and required the licence of the Crown. Commercial companies registered under the Companies Act were exempt from the requirement of obtaining a licence and overseas companies could obtain the same treatment

by complying with the provisions of sections 407 and 408 of the Companies Act, 1948.

Denning L.J. made some pertinent observations on the policy of the Mortmain statutes and showed that this was an instance of the application of an old principle to the needs of modern society. The original reason for the Mortmain statutes was that feudal lords were deprived of several of the most valuable incidents of tenure by the conveyance of land to a corporation. A corporation never died, never married and was never an infant so that reliefs, marriages and wardships could never be claimed by the lord of whom the land was held. The decay of feudalism did not result in the abrogation of the rule but its continuance was justified by reference to a different reason. This was the protection of the economic interests of the community, which would be affected by the uncontrolled accumulation of land in the "dead hands" of corporations. The instant case shows, however, that the original reason is by no means as antiquated as would at first sight appear, for as Denning L.J. pointed out: "Here is a foreign company which does not establish any business office in England and does not register itself in any way. By so doing it puts itself in a position, if not to defeat its obligations entirely, at least to make it most difficult for its dues to be collected from it. It makes it difficult for the tenant to recover on the landlord's covenants. It makes it difficult for the rating authority to obtain rates, or the housing authority to see that the houses are kept in proper condition, or even for the Revenue authorities to obtain their proper taxes."

Morelle, Ltd. have made another attempt to evict another tenant basing their claim on the fact they had registered their ownership of the house with the Land Registry. They argued that the fact of registration gave them back their rights of ownership as soon as their name was put on the register. Judge Clothier, however, rejected their contention on the ground that "the company must be taken to have known that it had no title at all to the property when it went to the registrar. In those circumstances it does not lie with them to say, 'although we deceived the Registrar, if not intentionally, we claim the benefit of that mistake, of which we were the initiators.'" (See *The Times*, September 14, 1954.)

It is somewhat surprising that Morelle, Ltd. did not challenge (as, it is conceived, it was up to them to challenge) the tenant's right to dispute their title on the basis of the well-known rule that a tenant cannot plead the *jus tertii* against his landlord. (See *Doe d. Johnson* v. *Baytup* (1835) 3 Ad. & E. 188.) Further, in the second case it does not appear that the Land Registrar was represented, and it is at least open to argument that the tenant could not question the landlord's registered title so long as the register had not been rectified. However, as those points do not appear to have been

raised, these cases should not in future be used as authorities against the validity of the rule that in an action brought by a landlord, or by anyone claiming through him, a tenant is not allowed to set up *jus tertii*.

O. R. Marshall.

Limits of the Applicability of the Doctrine of Constructive Notice

Smith v. *Jones* [1954] 1 W.L.R. 1089 provides a neat and important illustration of the limits of the applicability of the doctrine of constructive notice. The essential issue in the case was simple enough : the defendant, Jones, had purchased the freehold reversion of a farm subject to a tenancy agreement which existed in favour of the plaintiff, Smith. Smith claimed that the tenancy agreement did not truly represent the intention of himself and his original landlord, and he accordingly sought rectification of the agreement as against Jones, the purchaser from that landlord. Two questions arose for the decision of Upjohn J. : (1) Was Smith entitled to rectification on the facts of the case, and (2) if so, was he entitled as against the purchaser, Jones? As to (1) Upjohn J. held that the agreement represented the true intention of the parties and was not rectifiable : (2) therefore did not strictly arise, but as counsel had argued it fully, he decided to express his opinion on it. He conceded that a purchaser was bound by the rights of a tenant in occupation and was not entitled to assume that the tenant was in possession from year to year. (See *Taylor* v. *Stibbert* (1794) 2 Ves. 437.) The purchaser should look at the agreement and if he did not look he would be bound by its provisions (see *Daniels* v. *Davison* (1809) 16 Ves. 249), but in looking he was justified in assuming that the agreement correctly stated the relationship between the tenant and his landlord, and he was not bound to inquire whether the tenant had any rights which would entitle him to have the agreement rectified. (*Cf. Barnhart* v. *Greenshields* (1853) 9 Moo.P.C.C. 18.) Nor had the matter been altered by section 199 (1) of the Law of Property Act, 1925, which provided *inter alia* that a purchaser " shall not be prejudicially affected by notice of any matter . . . unless it is within his own knowledge or would have come to his knowledge if such inquiries . . . had been made as ought reasonably to have been made by him." The reason was that the purchaser was not bound to inquire of the person in possession whether the agreement under which he held correctly stated his rights. The agreement must be taken at its face value.

It can hardly be doubted that this decision is consistent both with good sense and with good conveyancing, and in this connection the extent of the enforceability of an equity of rectification is worthy of note. It is quite clear that the equity is enforceable

by the tenant against the original landlord and against a purchaser with *actual* notice of it. But it is not enforceable against a purchaser whose only knowledge is that the tenant is in occupation of the land. The extent of its enforceability by an assignee of the tenant involves different principles. If the assignment is regarded as a transfer of an interest in property to which the right to sue for rectification is merely incidental, it is valid : if it is regarded as the transfer of a bare right to litigate it is invalid as savouring of maintenance. (See *Prosser* v. *Edmonds* (1835) 1 Y. & C.Ex. 481; *Ellis* v. *Torrington* [1920] 1 K.B. 399.)

One further point remains for comment. This concerns the value of the case as a precedent, for since the agreement was not rectifiable *inter partes*, an expression of opinion as to its enforceability *inter alios* was not strictly necessary. Upjohn J. nevertheless expressed his views because of the full argument of counsel upon the point. This is reminiscent of the situation in *Re Diplock* [1948] Ch. 465, where the Court of Appeal found for the next-of-kin on the claim *in personam* but, although it was strictly unnecessary to do so, went on to consider the claim *in rem* because of the full arguments of counsel and also because in the event of an appeal to the House of Lords their Lordships might have liked their views on the matter. In the result their Lordships upheld the decision of the Court of Appeal on the claim *in personam* and did not express any view on the claim *in rem*. It can hardly be right, however, to regard the whole of the observations of the Court of Appeal on the claim *in rem* as being *obiter*; and the same is true of the views of Upjohn J. in the instant case. Indeed both cases seem to fall within the observation of Lord Simonds in *Jacobs* v. *L. C. C.* [1950] A.C. 361, 369: "there is in my opinion no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also."

O. R. MARSHALL.

REVIEWS

PHILOSOPHY OF LAW. By GIORGIO DEL VECCHIO (translated from the 8th edition by THOMAS OWEN MARTIN). [Washington: The Catholic University of America Press. 1953. 474 pp. $6.50.]

HOT on the heels of the English version of Del Vecchio's *Justice* [1]—at least by the standard rate of translation into English of Continental jurisprudential writing—comes the first English translation of his greatest work *Lezioni di filosofia del diritto,* first published in 1930. Other countries have not been so dilatory, since apart from the inevitable French and German editions, translations already exist in six other languages, including Bulgarian; a compliment returned in the text by three paragraphs devoted to Bulgarian legal philosophy, not ungenerous treatment when Karl Olivecrona is dispatched in four short sentences. Like his treatise on *Justice* this book falls into two distinct parts, the first an historical survey of legal theory, the second a systematic exposition of his own concept of law. In marked contrast with *Justice,* however, is the almost complete absence of footnotes. After a book, which at one point carried seventeen pages of notes to four of text, this comes as a relief, but not an entirely happy one, since this book is constantly blemished by insertion into the main text of matter suitable only for footnote form. Long catalogues of names, frequently without references to actual works, is not only valueless from the research point of view, but seriously affects the readability of the book as a whole. Thus, to give only two examples, pages 173–6 are a solid mass of authors' names and works without a word of commentary or explanation, while on p. 203 one finds fifty names ranging from R. Pound to J. Stone, but with no reference to what they have written. On the whole, this part of the book disappoints. To write with vitality and interest of other people's thought is a gift as rare as it is underestimated: potted versions of philosophic systems do not normally make interesting reading. One recalls regretfully, hoping that the comparison is not impertinent, the charm and lucidity of Bertrand Russell's *History of Western Philosophy* and even some of the writings of the late Professor Joad. One thinks also of Friedmann's *Legal Theory,* grotesquely hailed on its first appearance as "one of the great legal works of the present century," which does this sort of thing so much more skilfully. Digests of legal philosophy are as useful for a true understanding of the law as are "Plots of Great Novels" for a genuine appreciation of English literature. Unfortunately, as long as universities continue to cram under the elastic term *Jurisprudence* material enough to form the basis of three or four separate studies, they will have to be endured; as will the third-hand accounts of legal theories served up to bored examiners by students who have never so much as glanced at the originals. Three bright spots do, however, illuminate this part of the book: the first twenty pages, a brilliant if controversial classification of the scope of jurisprudence and its relations with the other sciences, the best of its kind since Stone's essay in *Province and Function of Law*: an extremely clear exposition of the Kantian doctrines as they affect law (a labour of love, one suspects): and a highly interesting section on modern Italian legal philosophy, which commands 43 pages as opposed to a mere 10 covering a similar period in Germany, Austria and Switzerland. One is glad to see at least an acknowledgment of the existence

[1] Reviewed in 17 M.L.R. 88.

of Rosmini, perhaps the greatest of modern Italian philosophers, whose idealist philosophy may one day replace Thomism as the "official" philosophy of the Roman Church. Clearly Del Vecchio has been greatly influenced by Rosmini's thought, in particular by his doctrine of absolute respect for personality "because personality manifests being in its highest form."

The remainder of the book, an explanation of Del Vecchio's idea of law, will certainly make the positivists gnash their teeth, if indeed they are not already biting their gums over the cavalier treatment afforded to their champions in the earlier part of the treatise. Del Vecchio places law uncompromisingly in the realm of values, and "value-judgments" lie strewn about as thickly as autumn leaves on Magdalen's Addison Walk. "Thus the ideal of justice represents one of the greatest values of the spirit and we may say the greatest together with charity." Unhappily there are great and obvious gaps in his reasoning at which even the most devoted disciple might raise an eyebrow. Here are two examples of assertions which blandly beg the question: "It is a fundamental exigency of consciousness to conceive the idea of the just as absolute," and, "Law must necessarily in so far as it evaluates actions take into account the motives which form and determine them." The evidence against the first proposition is at least as strong as that for it, while the question implicit in the second, as to how far the law does or should evaluate actions is never answered. Del Vecchio links law with morals; they are but different operations of the same ethical ideal. "Between law and morals exists not quantitative but qualitative differences," and later, "Law expresses always truths which are not physical but metaphysical, that is, it represents a truth superior to the reality of phenomena, an ideal model which tends to impose itself upon this reality, in short a principle of evaluation. It is a principle of practical evaluation, because it refers to operation of actions." Morals are the internal aspect of an ethical principle, law is its aspect in relation to others. The Dean of the Catholic University of America in a somewhat guarded "imprimatur," and the translator in his preface, welcome the book as a further blast on the trumpet against the monstrous regiment of positivists. Dr. Thomas Martin writes: "the work is very valuable in re-establishing natural law thinking as against the positivist trend so dangerous to liberty." Is it? Del Vecchio is no natural lawyer.[2] Law for him springs from the very nature of man, but for the scholastics law is an emanation of God. For Del Vecchio reason is the basis of law, while for St. Thomas Aquinas reason only perceives the law. Certainly both schools are absolutist in their notions and scout Pascal's refreshingly cynical dictum "three degrees of latitude overturn all jurisprudence," but whereas natural lawyers have an answer to the basic problem of a conflict between the ideal and the real, between natural law and positive law, Del Vecchio because he identifies them, is left speechless. Positive law which conflicts with natural law is not for the scholastics law at all, but Del Vecchio has no such answer. What can he say of the police State, hoist as he is with his own lyrical definition of the State as "the rational composition of the empirical antithesis between the individual and society. The State is the supreme organ of law and law is an emanation of human nature. The State is therefore man himself considered *sub specie juris*." Have not these words an ominously familiar ring? Where have we heard them before? Was it Kant, or Hegel, or Hitler or even Mussolini? Del Vecchio has less excuse than most for burking this fundamental issue and dispatching it inconsequentially in two vague pages at the end of the book. First as a dupe and later as a victim of Fascism he experienced in his own person this very problem. One could at least have expected an appendix. Without an answer such as that uncompromisingly proposed by the natural lawyers, idealistic legal theories tend to be lethal. They invest practical tyrannies with the sanctity of immutable legal validity: they are the Trojan horses within the ramparts of

[2] In the Thomist sense.

the rule of law. Are the positivists with their limited objectives really the greatest danger to liberty? This book shows that there are other more qualified, if well-intentioned, candidates for the position.

Norman St. John-Stevas.

The English Legal System. By A. K. R. Kiralfy, ph.d., ll.m., of Gray's Inn, Barrister-at-Law. [London : Sweet & Maxwell, Ltd. 1954. xxiv and 408 pp. 27s. 6d. net.]

Those of us who have derived great benefit in our student days from an introductory course in the English Legal System cannot but welcome this latest addition to the number of books which deal with this ill-defined subject. As Dr. Kiralfy tells us in his Preface, this book, which is based on his course of lectures, is designed to meet the needs of students working for the Intermediate ll.b. examination of the University of London, who will now be able to find all the material they require in one single volume. It is not intended, however, as a substitute for the numerous specialised textbooks on individual topics. Dr. Kiralfy has accomplished with great learning a task which is as difficult as it appears simple, and has contributed in many respects a novel point of view. London students will certainly be grateful to him. Unfortunately, the object of the book precluded the author from dealing with such topics as Habeas Corpus, the Privy Council, etc., and this is likely to detract from the value of the book for the general reader.

In the introductory chapter the learned author deals with the nature of law and the characteristics of the English legal system in short, authoritative sentences. Possibly because these topics do not lend themselves to elementary treatment, this is the least satisfactory chapter. Sentences occur which are not self-evident to the student without further qualification. Thus, it is stated that "Law may not be a science in the full sense but it may claim to be an art whose techniques prove adaptable to very different media" (p. 3). As must be expected from a scholar who has been so immersed in the intricacies of the forms of action, Dr. Kiralfy is at his best in dealing with history and procedure—the two main topics of the book. He lends powerful support to the theory of general liability in tort when he writes: "From the rule that moral or customary wrong plus damage, constituted a tort, the feeling grew that causing damage was in itself a basis of liability unless justification could be shown" (p. 51). He does not, however, accept this long-term view without qualification (p. 11). The history and development of trespass and consideration is particularly lucid and interesting. Where various viewpoints are current, these are presented with care and objectivity, but the author does not hesitate to make his own original observations. The action on the case receives special attention and we are given a detailed account of the way in which it was developed into a universal remedy. The view is expressed that the action on the case saved the common law from being superseded by the equitable jurisdiction of the Chancery (p. 51). New ground is broken with such topics as evidence and procedure which, for various reasons, have not as yet received full university recognition. This practice has certainly many advantages, for the student is enabled to see at once the whole pattern of the law in action at the elementary stage before venturing to follow up some topics at an advanced level. Modern trends are constantly referred to and the criticism is always thoughtful. Thus the learned author discusses the question of the powers of the Court of Criminal Appeal to order a new trial and dismisses the objections against these powers; he points out, however, that the present system compels the prosecution to prepare its case meticulously (p. 231). On the other hand, he criticises the power of the Court of Criminal

Appeal to increase sentence as illogical on the ground that "frivolity is not a crime" (p. 231). Extensive use is made of recent statistics; we are told, for example, that in 1953 40,000 jurors were summoned to Assizes and Quarter Sessions (p. 207 (r)). Again, the Evershed Report is widely used. The approach to the sources is traditional, but the author is careful to bring to our attention the practical difficulties, for instance, in the chapter on Precedent.

In a work such as this, it is of course inevitable that not every statement will receive general approval. Again, there are too many footnotes, and these do not always appear to have been judiciously chosen. "The curious offence of 'public mischief'" is mentioned casually, and the reader will look in vain for *R.* v. *Manley* and *R.* v. *Newland*. The *Tidy* v. *Battman* [1934] 1 K.B. 319 (C.A.) type of case does not appear in the section on precedent. Similarly, in the section on remoteness of damage there is hardly any indication of the importance of the subject in tort, and *Re Polemis*, *Bourhill* v. *Young* and *The Edison* are ignored. Yet, we are told that *Withers* v. *G. T. C.* [1933] 2 K.B. 536 is authority for the proposition that "an established star does not necessarily suffer from losing a part in a West End show" (p. 302). In the Introduction on the nature of law practically the only reference given is Dr. Goodhart's *English Law and the Moral Law*, and the authority given for the statement that the citizen has a right to resist arrest is Denning L.J.'s *Freedom under the Law* (p. 196). The statement concerning slander actionable *per se* must be extended to cover imputations of a contagious disease or of unchastity to a woman or girl (p. 63). Dr. Kiralfy, surprisingly, ignores Winfield's aphorism on the enormous increase of tort relations as a result of the invention of the railway trains which "killed any object from a Minister of State to a wandering cow" and states that "The introduction of mechanical transport . . . had relatively little effect on the common law of tortious liability" (p. 98). He finds it difficult to reconcile *R.* v. *Tolson* and *R.* v. *Wheat & Stocks* and states that: ". . . In such cases the fact of the divorce could have been confirmed" (?) (p. 131). In the section on Equity we are referred to Coke's view in 1 Inst. f. 24b (p. 22) but not to Snell, Cheshire or Megarry although elsewhere textbook writers like Potter and Plucknett are extensively mentioned (*e.g.*, pp. 30, 34, 55. etc.). Some other minor blemishes may also be mentioned here. A special tribunal is called "an administrative instrumentality" (p. 360); we also have "itemised costs" (p. 377). Perhaps we ought to register here a protest against the Continental use of the word "jurisprudence" as in "preventive jurisprudence" (p. 31). The term "criminal lunatic" must now be replaced by the more elegant and statutory "Broadmoor patient" (p. 210). Acts of Parliament are frequently referred to as, *e.g.*, Act of 1907 (p. 230), or St. of 1898 (p. 36); the reference to *Coggs* v. *Barnard* is (a) Fifoot 173 (p. 51), although the proper reference is given elsewhere (p. 55). There is also a number of misprints, *e.g.*, on p. 31 line 7; p. 61 line 18; p. 66 lines 8, 12, 29; p. 78 line 23; p. 190 line 18.

On the whole it may be said that this book is much more detailed than one is led to expect by its title and the Preface, and in some respects it may be used as a dictionary for those obscure points that the student is not likely to hear a great deal about, such as arbitration, rent tribunals, domestic tribunals, war pensions appeals tribunals, taxation, barristers' fees, etc., etc. Yet the account is not without humour. Commenting on the delays of Chancery proceedings in the early nineteenth century, the author writes that few litigants could hope to live to see the end of them: "A bill of revivor might revive the suit but was powerless to revive the suitor" (p. 179). In short, this is a book which manages to convey a wealth of learning and scholarship in a manner both attractive and stimulating to the reader.

A. G. CHLOROS.

THE ENGLISH LEGAL SYSTEM. Third Edition. By G. R. Y. RADCLIFFE and GEOFFREY CROSS. [London : Butterworth & Co. (Publishers) Ltd. 1954. viii and 440 pp. 27s. 6d. net.]

THE first edition of this book was reviewed at 1 M.L.R. 331. In the present edition the authors in addition to taking note of changes in criminal law and procedure and the extended facilities for legal aid in civil proceedings, have revised the earlier chapters on legal history in the light of recent research. The book remains an excellent general introduction to the study of English judicial institutions, past and present. Well and clearly written, it is a pleasure to read. It presents material which is sometimes regarded as refractory and dull in a lucid and often exciting form. The thirteenth and fourteenth century developments are particularly well described.

Outstanding as this book is for the general reader, the present reviewer is less certain of its merits as a textbook for students (for whom it seems to have been primarily designed). Most schools of law today include in their courses of study a subject usually called the English Legal System. There is, however, no agreement as to what contents should be grouped under this heading. In some a strong emphasis is placed on the past, in others only a sprinkling of history is tolerated. The book under review successfully avoids both the excesses of antiquarianism and the procedural technicalities scarcely suitable for a beginner. Nonetheless it distinctly favours the past to which fifteen chapters are devoted as against four dealing with the present legal system. This must mean that in many cases the student will have to delve into other books in order to cover his syllabus; a position which is not necessarily to be deplored. Furthermore, the small amount of detail which the book contains calls for some comment. What is an obvious merit in a work conceived for the general reader is apt to become a drawback where the student is concerned. It is believed that without sufficient details the student has no means to understand fully the growth of legal rules and institutions. A generalisation, however masterly, has an incipient tendency to mislead and for an untrained mind may prove a dangerous pitfall. The authors could easily have enlarged their account of legal institutions (to which they profess to confine the book) at the expense of pages devoted to the law itself. The unenviable task of drawing the line between the machinery of the law and its produce is on the whole very skilfully performed, but occasionally there is a digression into the law itself. Thus the authors describe at some length the history of trusts, mortgages and contract. This is all the more surprising in view of the exceedingly limited space they allow to the development of the jury.

Finally, there are a number of inaccuracies. On p. 69 the reference is to *Ashton* v. *Thornton,* 1819. It should be *Ashford* v. *Thornton* (1818) 1 B. & Ald. 405. The proposition made on p. 104 that "the main body of councillors in the Star Chamber were not Privy Councillors at all" can only be accepted as true from the period beginning about 1540 when the Privy Council was established as a definite institution. From the account given, however, it is difficult to decide whether the writers refer to the reign of Henry VII or, indeed, to the late sixteenth century. It should also be noted that G. R. Elton in *The Tudor Revolution in Government* (1953) is of the opinion that (p. 344) : "in membership the Star Chamber was steadily approximated to the privy council in the course of the century." Furthermore, no mention is made of the fact that although the Court of Star Chamber took most of the judicial work of the old Council, the Privy Council dealt with some of it, especially cases of importance to the Crown. On p. 215 it is stated that after 1705 writs of error in criminal cases "came never to be refused." This is strictly true only as regards misdemeanours. From the discussion of the Statutes of Jeofail and the Bill of Exceptions the student may conclude that they applied equally in civil and criminal proceedings. The Act of Union with Scotland, 1707, did not "make" the Lords the Court of Appeal from the Court of

Session (p. 218). It is misleading to state (p. 283) that proceedings under the Workmen's Compensation Acts are brought in the county court without referring to the fact that cases arising since the National Insurance (Industrial Injuries) Act, 1946, are dealt with by a special tribunal. On p. 290 the number of puisne judges in the Queen's Bench Division is given as twenty-four, whilst on p. 304 as seventeen. The Revenue side of the Queen's Bench Division is duly mentioned on p. 311 but there is no reference to a direction of the Lord Chancellor made in 1950 by which all matters which have hitherto been heard by way of petition or case stated on the Revenue side of that Division will be heard before a judge of the Chancery Division. The authors seem to have overlooked the Juries Act, 1949, as juries are still classified as either common or special (p. 322). The concluding chapter entitled "The Legal System and the State" makes excellent reading. The student, however, may be left with an impression that there are no administrative tribunals in this country.

J. K. GRODECKI.

THE BOOK OF ENGLISH LAW. By the late EDWARD JENKS, D.C.L. (OXON). Fifth Edition revised by D. J. LL. DAVIES, M.A., LL.B., of Gray's Inn, Barrister-at-Law, Professor of Law in the University of Wales. [London: John Murray. 1953. 347 pp. 21s.]

THIS book, originally published in 1928, was intended primarily for laymen interested in the place of law in modern communities and its influence on economic and social policy. The plan and arrangement were connected with a course of lectures to be given by the new Professor of Law at the London School of Economics, and they owed much to the advice of Lord Atkin and Sir William Beveridge. If the author had been described on the title page simply as "The Teacher of Law," any English lawyer of that generation would have guessed that it was by Dr. Edward Jenks, but we have never understood why he called it *The* Book of English Law. Dr. Jenks disclaimed having the pen of a Maitland, Pollock or Dicey, and this book is not one of those permeated with the style of an original and unique personality and which are consequently unsuitable for posthumous perpetuation at the hands of other editors. It would not be appropriate to attempt to pick holes in the broad generalisations: the book is not intended for lawyers or even for law students, but for laymen; and for them it does convey a sound general impression of legal principles. It is in a different category from those books of potted law for laymen which let people loose, as it were, in a pharmacist's shop and lead them to believe that they can make up their own prescriptions. The disadvantage of the kind of book that omits all references to cases, however, is that it does not illustrate the technique of adjudication. There is a chapter quaintly called "Judiciary Law" (is that what laymen think we call it?) and a chapter on Statute Law; but without the help of illustrative cases the former can hardly convey a notion of how cases are decided, and the latter cannot really show how statutes are interpreted.

The fourth edition appeared in 1936. The present edition, prepared by Professor Llewelfryn Davies, brings the law up to date without substantially altering the character of the book. The alterations are done competently, as one would expect from an experienced law teacher with a wide range of learning. With the help of somewhat smaller type, the length has been reduced from 460 to 347 pages. The format is pleasing and the price reasonable.

O. HOOD PHILLIPS.

Tax Planning with Precedents. By D. C. Potter, LL.B., and H. H. Monroe, M.A., Barristers-at-Law, assisted by H. G. S. Plunkett, Barrister-at-Law, and formerly one of H.M. Inspectors of Taxes. [London : Sweet & Maxwell, Ltd. 1954. xxiii and 304 pp. (index). £2 5s. net.]

This excellent work has a twofold purpose. First, to elucidate the principles concerned with "tax planning," which term the learned authors define as the appreciation of tax incidence as a factor in the disposition of property which can be made between a man and his family; the term "tax" includes income tax, surtax, estate duty and stamp duties. Second, and of even greater importance, it provides the legal draftsman with a large number of precedents —supplementary to existing conveyancing precedents—to be used where tax considerations are of prime importance. The work is based on the principle of regarding the family and not the individual as the taxable entity. The authors disclaim any political bias but they clearly consider that "tax planning" is not anti-social and that there is nothing morally improper in minimising the family-unit's liability to tax by methods within the law. This despite Lord Simon's pungent comments—though directed to ingenious modes of tax avoidance far removed from the straightforward methods considered in this work—in *Latilla* v. *I.R.C.* [1943] A.C. 377, *viz.*: "There is no reason why their efforts and those of the legal gentlemen who assist them should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship." The propriety of "tax-planning" must inevitably be left to an individual's conscience; indeed with the present high rates of taxation, there is doubtless a good deal to be said for the rather straightforward suggestions put forward in this work.

The book consists of eight chapters each of which opens with a concise, learned and very readable account of the principles concerned, followed by numerous precedents exemplifying these principles; where appropriate brief comments, with special reference to the tax advantages to be gained, are made on the several clauses of the precedents while all relevant case and statute law and, on occasion, numerical examples are interwoven into the general outline.

Chapter 1 is concerned with Deeds of Covenant, that is to say, where an individual binds himself to make periodical payments to another; the tax advantage is that the covenantor pays much less surtax while the covenantee, who receives his income under deduction of tax, is enabled to recover a considerable amount of the tax by reference to his personal reliefs; the introductory section contains (pp. 7–11) an excellent account of the meaning and effect of the term "free of tax." It is emphasised throughout that there must be an actual payment to the covenantee and that it is not enough if the sum due is paid back to the covenantor to be used for the covenantee's maintenance.

Chapter 2 deals with Separation Deeds and contrasts the results flowing from the two types of "tax-free" payments normally used in such deeds with special emphasis on the rule in *Re Pettit* [1922] 2 Ch. 765. Infant settlements are dealt with in Chapter 3 and in this connection the authors observe that "one cannot have one's cake and eat it"; for example estate duty cannot be reduced if the settlor desires to retain a life interest in, or control over, the property to be settled. The authors suggest that personal trustees are preferable to a trust corporation provided that one is a solicitor or accountant with, of course, the usual professional charging clause.

The next chapter (4) upon Discretionary Trusts is one of the best in the book and should be read in conjunction with the recent decision of the Court of Appeal in *I. R. C.* v. *Broadway Cottage Trust* [1954] 3 W.L.R. 438—handed down after the book was written—regarding "the class of beneficiaries" benefiting by such trusts. The Variation of Existing Settlements is dealt with in

Chapter 5 with its inevitable consideration of *Chapman* v. *Chapman* [1954] 2 W.L.R. 723, and the possible repercussions flowing therefrom. Four types of variation are considered, namely, surrender of life interest, release from an annuity, sale of reversion to a life tenant, and division of assets between tenant for life and remaindermen.

The problems arising from the death or retirement of a partner are considered in Chapter 6 where it is observed that if the widow of a partner is to have enforceable rights to any annuity provided for her, estate duty will have to be paid on the value of the annuity. Pension schemes are dealt with in Chapter 7, the precedents being drawn up in a form known to be acceptable to the Revenue. The final chapter (8) is concerned with Wills and the authors point out that while it is not easy to draw precedents to relieve the burden of taxation, mitigation may best be effected by consideration of the incidence of estate duty, *i.e.*, the assets upon which it will fall. The practitioner is cautioned against advising a testator to leave a number of annuities a practice formerly common where dependants were to be provided for owing to the high rates of income tax and the liability to a claim for estate duty on the death of an annuitant.

This book should prove invaluable to every practitioner and not merely to those specialising in revenue law; of the 292 pages of reading matter no fewer than 178 are devoted to the forty precedents contained in the book. The Tables of Cases and Statutes are adequate while the Index is more than thorough. It can safely be predicted that this work will become a necessity for every practising barrister and solicitor.

A. FARNSWORTH.

MARSDEN ON COLLISIONS AT SEA. Tenth Edition. By KENNETH C. MCGUFFIE, B.L. [London : Stevens & Sons, Ltd. 1953. lxxiv and 882 pp. (with index). £5 10s. net.]

TEMPERLEY ON THE MERCHANT SHIPPING ACTS. Fifth Edition. By the HON. SIR WILLIAM L. MCNAIR, LL.M., and JOHN P. HONOUR, M.A. [London : Stevens & Sons, Ltd. 1954. lxxxii and 923 pp. (with index). £5 10s. net.]

NEW editions of these standard works are very welcome and indeed somewhat overdue, especially in the case of Temperley's *Merchant Shipping Acts*, since during the twenty-two years which have elapsed since the appearance of the fourth edition some eight Merchant Shipping Acts have reached the statute book as well as several other enactments which are important to the subject-matter of this volume. The new additions necessitated by this legislation are in the order of two hundred pages, a sufficient indication of how the position has changed since 1932. These new statutes have so far seldom come up for construction by courts of law, and there is little that the editors have been able to do beyond setting out the text, and giving the necessary references to the older Acts and to the various statutory rules or orders which have already been issued. There have of course been a number of important cases on the older statutes, especially on the sections in the 1894 Act, dealing with the limitation of his liability by a shipowner, and these have been carefully noted up. This edition will undoubtedly maintain the high prestige of the book which had at the outset of its career to contend with a volume on the same subject by no less an author than the young T. E. Scrutton, yet nevertheless became the accepted textbook of the Admiralty lawyers.

While Temperley consists of an annotated edition of the various Merchant Shipping Acts Marsden is a textbook of the conventional type, so that the fairly substantial overlapping of the two volumes does not very much matter.

Even when the authors or editors are dealing with the same subjects the treatment is so different in character that the relevant sections must be regarded as complementary, and a careful practitioner would undoubtedly consult both authorities.

Marsden was typical of the better textbooks of its period. It provided and provides a straightforward exposition of the law supported by quotations from the judgments in the leading cases. It was written from a specially practical angle so that it had a value beyond that of the ordinary textbook, and this is no doubt one of the reasons why it achieved the authoritative position which it has held in the profession for well over a generation. Since 1880 (the date of the first edition) there have been changes of such substance in the law relating to collisions at sea, particularly of course those associated with the Maritime Conventions Act, 1911, but also, and hardly less important, in respect of contributory negligence, that a practitioner of the 1880s transported into the 1950s would hardly recognise the legal landscape. Marsden had been brought up to date by a succession of able editors in the usual way, that is by spatchcocking the new statutes and decisions at appropriate positions in the text. A real overhaul was, however, long overdue and this has been undertaken with industry and ability by Mr. McGuffie in the new edition which he describes in his Preface as "a major revision of the whole work." Marsden's admirable example has been well followed, and in particular the citations from recent judgments have been well chosen, and are most apposite to the topics dealt with. It requires rather fuller treatment therefore than Temperley. I congratulate the editor on a thorough and excellent piece of work.

The editor says further that in view of the authority which has come to be attached to it he has preserved "the author's original wording . . . as far as possible." This is no doubt true in those chapters where the changes in the law have been fewer or less substantial, but the basic chapter of the whole work, which is that which discusses the law of negligence in relation to collisions at sea, has been so completely rewritten that it is not easy to find the passages from the original Marsden. On the whole I think that this was wise, for even since the last edition there have been judgments of outstanding value—one might refer to that of Greer L.J. in *The Eurymedon* [1938] P. 41, as an example (though it was hardly necessary after quoting the whole of the most important passage from the judgment at p. 30 to give it again verbatim at p. 34) which have either changed or put a new slant on the law in such a way that a completely new exposition was called for rather than an attempt to modify the earlier text.

In particular the development of a new outlook as to the importance of the Collision Regulations since the 1880s has necessitated a new approach; for these regulations have for a hundred years and more been quite fundamental in the practical handling of collision cases. The first Collision Regulations date from 1840 though of course they only gave precision and authority to maritime usages and conventions which had long been followed by nautical men and especially in the Royal Navy. The earlier practice of the Admiralty judges in a particular case was to regard the fact that one of the regulations had been broken as one factor, though doubtless an important one, in coming to a decision as to negligence or no negligence. There followed a period, the one during which Marsden wrote his book, when the fact that there had been such a breach was decisive for a finding of negligence. This presumption was abolished by the Maritime Conventions Act, 1911, since when there has been some uncertainty as to how to treat breaches of the regulations in connection with the problem of negligence. In *The Heranger* [1939] A.C. 94, the House of Lords seems to have decided that the original century-old approach was the correct one.

Marsden very naturally placed his treatment of the Collision Regulations immediately after his General Chapter on Negligence. Mr. McGuffie devotes the whole of Part II of the book to this subject, so that the consideration of the

regulations is divorced from the general discussion of negligence. This is a little unfortunate, but perhaps unavoidable, since the promulgation of the 1954 Collision Regulations (the London Regulations), an event of great importance, has necessitated a detailed comparison with the old regulations of 1910. Mr. McGuffie also provides a full annotation of the regulations in the light of the decided cases which will be of the greatest value to practitioners. Part II accordingly runs to very nearly 300 pages of text, and goes far to explain the greatly expanded character of the work which has risen in volume from 540 to 850 pages. It should, however, be stated that the print is both larger and better spaced in the new edition, the format has been much improved, and the book is altogether more attractive, an improvement on which the publishers are to be congratulated.

In Part I the chapters immediately following on the one on Negligence have not been much altered, except that Mr. McGuffie has adopted a policy of putting the historical introductions into separate chapters. This appears here and there to lead to repetition. The chapter on Damages has, however, been a good deal rewritten, as the law on certain aspects of this subject has been developed and restated basically in recent years. In particular the subject of remoteness has come in for consideration on a number of occasions, and the results of the recent decisions are lucidly set out.

The Maritime Conventions Act, 1911, revolutionised the illogical rule relating to division of loss which the Admiralty had taken over from the common maritime law of Europe as exemplified in the Laws of Oleron, Wisby and other Codes. Since then the Admiralty judges have been feeling their way in the difficult duty of apportioning loss, a process in which the important case of *The MacGregor* [1943] A.C. 197, is a landmark. The time had come for attempting a coherent account of their labours and this Mr. McGuffie has essayed with considerable success in a largely rewritten chapter on the subject. Marsden's long historical note has been elevated to the main text and given a chapter to itself. One wonders whether it might not have been wiser to have sacrificed some of this detailed historical material, the retention of which in the main text must have added substantially to the expense of printing.

Certain aspects of Admiralty practice have also received a good deal of attention in recent years, and no more important ground has been found for the application of the new law of evidence under the 1938 Act than that of Admiralty proceedings. The chapter on practice has accordingly been much expanded and has become the longest in the book.

Marsden's short Chapter 11 on Collisions in relation to the Shipowner's Liability as Carrier, and to Marine Insurance, has been rather unnecessarily split into two very short chapters; the former is practically unaltered, the material in the latter has been somewhat rearranged and improved. The treatment of these subjects is, however, rather superficial and does not reach the level of other parts of the work. These subjects are rather on the periphery of the main theme of the work, so that a detailed criticism on a number of rather doubtful statements which they contain would be out of place, but the editor might with advantage give further consideration to these aspects of his subject when he prepares the next edition.

A collection of the local rules of navigation existing in various harbours, ports, and estuaries, not to mention the Great Lakes, has long been an important feature of Marsden where it was heretofore collected in an Appendix. Mr. McGuffie has systematised and extended this material which is now confined in the United Kingdom and is set out in a new Part 3, running to close on 200 pages. As he points out, American and Canadian practice has tended to diverge, and to retain the detailed material from the other side of the Atlantic would have had little value and would have added still further to an already bulky volume.

In a new Part 4 Mr. McGuffie has collected a number of documents of interest and importance to maritime lawyers. Here are printed the original

Brussels Collisions Convention of 1910 which led to the Maritime Conventions Act, 1911, together with the recent Brussels Conventions (1952) on the arrest of seagoing ships and on other matters relating to international, civil and criminal jurisdiction in matters of collision. These are of some importance in connection with the unification of maritime law and will be studied with interest. There are also printed a number of useful precedents, such as specimen towage conditions, specimen preliminary acts and pleadings, the Beaufort scale of wind force, with some specimens of calculations in those difficult subjects, the division of loss and the limitation of liability. These should be of great service to practitioners.

CHORLEY.

SURVEY OF AFRICAN MARRIAGE AND FAMILY LIFE (by LUCY MAIR, ARTHUR PHILLIPS and the REV. LYNDON HARRIES). Edited by ARTHUR PHILLIPS. Published for the International African Institute by Oxford University Press and Geoffrey Cumberlege. [London: 1953. xli and 462 pp. and map. £2 5s.]

THE ADMINISTRATION OF JUSTICE AND THE URBAN AFRICAN. By A. L. EPSTEIN. Colonial Research Studies No. 7. [London: H.M.S.O. 1953. 124 pp. 7s. 6d.]

ONE welcomes with pleasure the appearance of such works as those under review, since it is notorious that legal science in Africa is still in its preliminary stages. There are two main tasks: first, original researches in the field into customary law; secondly, the elucidation of principles through the comparative analysis and restatements of the systems of law applicable in Africa. Mr. Epstein's work falls into the first category, Dr. Phillips' into the second. Both fulfil their purpose admirably.

The Survey of African Marriage is the first-fruit of the investigation initiated by the International African Institute and other distinguished bodies into African marriage customs and legislation affecting marriage in Africa; it is, in effect, the reports of the three investigators—Dr. Phillips, Miss Mair, and the Rev. Lyndon Harries—invited to study the legal, anthropological, and missionary aspects of the inquiry respectively. The separate reports are tied together by an *Introductory Essay* by Dr. Phillips, as Director of the Survey and editor of this volume.

The contributions of Dr. Mair and Mr. Harries are, perhaps, not strictly relevant in a legal context; but they deserve study by the majority of readers, who will be unfamiliar with the background; and they will enable Mr. Phillips' contributions to be read with more understanding.

The inquiry called for by the Survey was considered to fall into two parts: (a) the preliminary survey of documentary material; (b) field-studies in Africa which might appear to be required as a consequence of this survey. The present work represents only the first stage of the inquiry; it would thus be inept to complain that the customary laws of marriage are not fully recorded here. Nevertheless, the report does show the paucity of present material and the need for further thorough and widespread investigation. In fact, Dr. Phillips (in Part II, *Marriage Laws in Africa*) has confined himself (very properly) largely to an investigation of legislation affecting marriages between Africans, administrative policy in regard to marriage, and some problems of conflict of laws which necessarily arise between systems based respectively on European law, religious law, and tribal law. This involves a consideration of the recognition and application of African law, and of the polygamous or potentially-polygamous character of customary marriage.

The juridical position of "bride-price" is examined; one notes the movement away from the early idea that it equalled "wife-purchase." The author deals with problems of capacity (especially where European notions of consent and the age of marriage conflict with native ones). The option of statutory marriage and its consequences are considered by Mr. Phillips in some detail, as are problems of divorce. For once—in books on Africa—the fact that Islam has many millions of adherents is fully recognised.

Dr. Phillips' work should be invaluable not only to the local judge or administrator requiring detailed, critical and careful exposition of the marriage laws of Africa, but to a wider circle also, namely, all those who are interested in conflict-problems. Africa might well be called a laboratory of experiment in this field, since one encounters not merely conflicts of the "inter-territorial" type familiar to English lawyers, but "inter-personal" or internal conflicts between systems with co-extensive or overlapping jurisdictions. Some work has already been done in this by Lewin in his *Studies in African Native Law*. One cannot but agree with the discerning judgment at p. xxii of the *Introductory Essay*, where Dr. Phillips says:

> "In reality, the cleavage is not simply between Christian law and African law, but between Christian law and secular law in general (including most European systems of law). This fact tends to be obscured by the prominence given to the issue of polygamy in relation to African marriage. . . . A proper appreciation of the situation in this respect is necessary in order to avoid the sort of confusion which leads to a false identification of Christian marriage with 'European' marriage."

One thus meets such old friends as *Re Bethell*,[1] *Hyde* v. *Hyde & Woodmansee*,[2] and *Risk* v. *Risk*,[3] in a new setting.

Not the least valuable feature of the author's treatment is its extensive geographical coverage: the laws of French, Belgian and Portuguese territories in Africa (which are even less accessible to the general reader) are also considered.

Despite careful reading the reviewer must confess failure to discover any errors or doubtful statements—a tribute both to the exhaustive and authoritative work of the author, and to the excellence of its presentation (the typography and arrangement are of the high standard we have come to expect from the O.U.P.).

If one has any criticisms of the rest of the *Survey*, they are minor ones. The decision to produce three books in one cover has certain disadvantages: there are three indices, and nomenclature is not always uniform (*e.g.*, in regard to "bride-price"). The editor considered that the advantages outweighed the disadvantages. The effort to compress existing knowledge of customary marriage into a small compass (in Part I of the volume) has meant, for instance, describing the Ashanti (a matrilineal people) in the same context as the patrilineal tribes of West Africa. There appears to be a misconception in Part III at p. 418; it would not be true to say that all educated or illiterate Africans regard the Akan customary law of succession as "unjust and unnatural." Mr. Harries' statement that "any stranger who may be adopted into the family, no matter how, can rightly claim to be [a man's] successor" is impossible in Akan law, which does not recognise adoption.

Mr. Epstein's is a slighter work, but not thereby the less valuable. His material consists largely of reports of cases heard in urban native courts in Northern Rhodesia, and an analysis of these cases and the law that they represent in the light of the author's thesis that urban courts are not merely native courts in towns, but require recognition (in the Native Courts Ordinance

[1] (1888) 38 Ch.D. 220.
[2] L.R. 1 P. & D. 133.
[3] [1950] 2 All E.R. 973.

and elsewhere) as a special problem. The urban courts, established in multi-racial communities within the Copperbelt, endeavour to administer a number of different tribal laws in a context far removed from that which gave them birth; hence the problems which require, so the author maintains, sociological as well as legal analysis. His cogent criticisms deserve attention far beyond the borders of Northern Rhodesia.

A. N. Allott.

Judicial Review of Legislation in New York, 1906–1938. By Franklin A. Smith, ph.d. [Columbia University Press. London: Geoffrey Cumberledge. 22s. 6d. net.]

This book somewhat disappoints. It deals with a first-rate subject but gives it rather slogging treatment. It is (this ought to be said at once) a thorough and classified index of the cited (800-odd) cases, but it is not an inspired analysis of the important themes which are their raw material. It is, typically, a thesis for a Ph.D.; it is not really a book which (at least intellectually) disposes of an important problem.

Dr. Smith's object is to explain in detail how the New York courts have dealt with local legislation as far as its validity was attacked on the grounds of many limiting provisions in the New York state constitution. The official (American) name for this is "judicial review," but the review is often enough a conflict between different agencies of government. The conflict is peculiar because it not only exhibits a struggle over frankly political issues institutionalised within strict procedural forms but it also shows a significant limitation of legislative power far and beyond the "civil liberties," the protection of which was the main justification of the classical theory of separation of powers. The judiciary thus enters (albeit nervously and hesitantly) the agitated political arena, yet still manages to appear aloof from direct involvement by recourse to a strange ritual which is the so-called objective assessment of the "constitutionality" (or otherwise) of the legislative command. The appearance is one of permanent and celestial neutrality, the reality is a transient and very human preference for either side. And while preferential shifts are, even in the not-so-long run, obviously unavoidable, the need remains for more impersonal criteria which, however broad, would still provide a frame of reference for the concept of "constitutionality" and its reverse. Herein lies the making of a truly public law, if it is to be more than a mere description of existing administrative and constitutional arrangement, or the mere labelling of relevant judicial decisions as either "conservative" or "progressive."

But, in America, judicial review has also had a more urgent and practical appeal. Since unfortunately state legislators frequently showed a quite unabashed disposition (charmed at times by a refreshing absence of hypocrisy) to further their own personal interests rather than what is known as the "common good," external supervision became a real necessity as a kind of "paternalistic" check on the irresponsibility of the politicians. The author gives some examples of judicial veto on (to put it crudely) legislators using public money to recompense themselves or their friends; such as payment of an assemblyman's or magistrate's expenses in defending a libel suit or compensating a company which had built a road for its own purposes (pp. 51–53).

Apart from such instances, however, judicial review in New York was never conceived of as a guarantee for honest financial stewardship; its main function has always been considered to be the exegesis of the state constitution, the operative provisions of which are however so ambiguous and wide that a variety of alternative constructions has always been rationally possible. In this respect a few trends of interpretation are interesting to record. In

the field of taxation, for example, the courts and legislature were in this period (1906–1938) only once in disagreement, the single exception being a case where civil liberty was infringed (pp. 194 *et seq.*). In labour law the position was very different and the *Ives Case* (1916) 21 N.Y. 271, is the outstanding example of the Court of Appeal's holding the Workmen's Compensation Act unconstitutional as deprivation of property without due process of law. This attitude of the judges (which later changed) stands in remarkable contrast to their attitude to other forms of economic control inaugurated by the legislature, particularly in agriculture and the dairying industry. In the field of civil liberties, regarded as the most significant area for judicial intervention, "in so far as the legislature succumbed to hysteria, as critics assert, the courts did little to restrain its actions" (p. 77).

What is the final judgment about judicial review arrived at in this book? Our author agrees neither with its opponents who have seen it as "an insuperable obstacle to essential laws" nor with the enthusiasts who hoped that it would become "the cure for legislative misbehaviour" (p. 225). This looks like a nice compromise conclusion—but what does it mean? Is it merely an endorsement of the status quo? Be this as it may, I think that a final judgment is as yet hardly possible, for judicial review still awaits its definitive study.

S. J. STOLJAR.

AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW. By GEORGES DELAUME, Docteur en droit (Paris), Counsellor, Legal Department, International Monetary Fund. Bilateral Studies in Private International Law, No. 2. [Columbian University in the City of New York, Parker School of Foreign and Comparative Law. 1953. 78 pp. 12s. 6d.]

THIS useful booklet constitutes the second study in the series which was most auspiciously opened by Professor Nussbaum's essay on *Anglo-Swiss Private International Law*. The high level set by its predecessor is well maintained. The author, a well-known authority on both French and American private international law, has succeeded in giving nearly all the information required in the daily practice of American-French legal relations. There can be no doubt that every practitioner in this field will find this work an indispensable tool in his daily labours. Like Professor Nussbaum the author has, however, by no means been satisfied with setting out the *lex lata* or what is generally regarded as such. Critical remarks, suggestions *de lege ferenda* and—most useful of all—a careful comparative approach to the basic conceptions on either side contribute to making this work no less useful for those interested in the more scientific aspect of the topic under consideration. As the American-French conflict of laws is far less influenced by the convention of 1853 than is the American-Swiss conflict of laws by the convention of 1850 the author had to investigate a great deal of case law, both in the U.S.A. and in France—a laborious and difficult task which has been well mastered. Readers in this country will, no doubt, agree that the suggestion made on Niboyet's authority by the author (p. 62, note 341) according to which the Anglo-French Convention on reciprocal enforcement of judgments was of "extremely limited scope" is not justified. But this is, as far as the writer of this review can see, an isolated error outside the author's proper field. No distrust in respect of the general accuracy of his lucid exposition of American and French law should be derived from it.

E. J. COHN.

A Register of Legal Documentation in the World. Prepared by the International Committee of Comparative Law with the support of the International Committee for Social Science Documentation. [UNESCO: On sale at H.M. Stationery Office. 1953. 362 pp. 22s. 6d. net.]

This catalogue shows how the law is made and where it is recorded in almost every separate legal system in the world. It will be clearly of great value to practitioners in search of information on foreign law and to comparative lawyers generally. Their thanks are therefore due to all who have helped to produce this catalogue: UNESCO, who organised it as a part of their survey of documentation on the social sciences, the four members of the International Committee of Comparative Law who compiled most of the information, and Professor René David, the then Secretary-General of this Committee, who edited the several contributions.

The skill of the compilers of this catalogue and the inherent similarity of modern legal techniques have made it possible to present the most diverse materials in very similar order of arrangement. Complete uniformity could, however, not be maintained. Thus, all the laws in force are usually enumerated, but with regard to English law only the current series of law reports are listed. To give a catalogue of all the reports would have been impracticable, but at least the *English Reports* and Sweet & Maxwell's excellent *Guide to Law Reports* might have been mentioned. In its present form the section on English law shows at a glance the importance of case law as compared with Continental laws, but the opportunity to demonstrate equally the inaccessibility of case law has had to be missed. Again, the absence of the rubrics "Constitution" and "Codes" from the section on English law carries an obvious message, but the omission of "Constitution" in the section on French law is rather surprising.

In addition to enumerating sources in the strict sense the catalogue provides lists of legal periodicals and of bibliographical literature. In the case of most countries there is also a list of *Centres D'Activité Juridique* giving the addresses of institutes of research, learned societies, law libraries and similar institutions. In the case of the U.S.A. this item appears as *Centres of Legal Documentation* and consists mostly of the addresses of private or trade associations without mentioning the Law Schools, the State Bar Associations or the Library of Congress. In the case of England this item shrinks to seven lines, mentioning only some of the principal law libraries in London, Oxford and Cambridge—an illustration, perhaps, of the national vice of understatement which is, however, not followed in the case of periodicals where the articles appearing in the *Law Quarterly Review* are described as "detailed," the case notes as "comprehensive and critical," and the book reviews as "scholarly," as against the *Modern Law Review*, where the epithet "valuable" is used for articles, and "detailed" for the rest. The M.L.R., incidentally, is no longer a quarterly; the *Cambridge Law Journal* no longer an annual publication.

The section on English law might be improved by enumerating separately those statutes that have codified certain portions of the law. It might also be helpful to provide a short introduction to each legal system, explaining the formal authority of the various sources of law, the distribution of legislative power and the relative importance of statute, case law and custom, a source of law ignored at present.

J. Unger.